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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-6779

WALTER LITTLE,
Appellant,

v.

GLORIA STREATER,
Appellee.

ON APPEAL FROM THE APPELLATE SESSION
OF THE SUPERIOR COURT OF CONNECTICUT

JURISDICTIONAL STATEMENT

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June 12, 1980

INDEX

	Page
OPINIONS BELOW.	1
JURISDICTION	2
CASES BELIEVED TO SUSTAIN THE JURISDICTION . . .	2
STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED .	3
QUESTION PRESENTED	3
STATEMENT OF THE CASE	3
HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW	5
THE QUESTION IS SUBSTANTIAL	7
CONCLUSION	19

TABLE OF AUTHORITIES

Page

CASES

Michael B. v. Superior Court, 86 Cal. App. 3d 1006, 150 Cal. Rptr. 586 (1978) 7

Bigsby v. Bates, 59 Ohio Misc. 51, 391 N.E. 2d 1384 (C.P. 1978) 8,9,13

Boddie v. Connecticut, 401 U.S. 371 (1971) . . . 10,11,12,13

Booth v. Hart, 47 Conn. 480 (1876) 17

Boykin v. Alabama, 395 U.S. 238 (1969) 3

Britt v. North Carolina, 404 U.S. 226 (1971) . . 15,16

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) 15

Caban v. Mohammed, 441 U.S. 380 (1979) 17

Coleman v. Alabama, 377 U.S. 129 (1964) 3

Commonwealth v. Possehl, 355 Mass. 575, 246 N.E.2d 667 (1969) 7,9,10

Cramer v. Morrison, 88 Cal.App. 3d 873, 153 Cal. Rptr. 865 (1979) 11

Evans v. Newton, 382 U.S. 296 (1966) 15

Ferro v. Morgan, 35 Conn.Supp. 679, 406 A.2d 873, cert. denied, 177 Conn. 753, 399 A.2d 526 (1979) 6,9

Franklin v. District Court, 194 Colo. 189, 571 P.2d 1072 (1977) 7,9,10

Madeline G. v. David R., 95 Misc.2d 273, 407 N.Y.S.2d 414 (Fam.Ct. 1978) 9,15

Graves v. Daugherty, No. 14517 (W.Va. May 13, 1980) 7,9

Griffin v. Illinois, 351 U.S. 12 (1956) 10,15,16,18,19

Hepfel v. Bashaw, 279 N.W.2d 342 (Minn. 1979). . 8,11

Kelsaw v. Green, 6 Conn.Cir.Ct. 516, 276 A.2d 909 (App.Div.Cir.Ct. 1971) 17

Knox v. Siddell, No. 734 (Conn.App.Sess.Super. Ct. March 16, 1979). 9

Lascaris v. Lardeo, 100 Misc.2d 220, 417 N.Y.S.2d 665 (Fam.Ct. 1979) 9,11

Lurry v. Mills, 152 N.J. Super. 127, 377 A.2d 804 (1977) 9

M. v. S., 169 N.J. Super. 209, 404 A.2d 653 (1979) 9

Mayer v. City of Chicago, 404 U.S. 189 (1971) . 16

Mosher v. Bennett, 108 Conn. 671, 144 A. 247 (1929) 17

Ortwein v. Schwab, 410 U.S. 656 (1973) 12,16

Raley v. Ohio, 360 U.S. 423 (1959) 3

Roberts v. LaVallee, 389 U.S. 40 (1967) 15,16

Robertson v. Apuzzo, 170 Conn. 367, 365 A.2d 824, cert.denied, 429 U.S. 852 (1976) 5,14

Smith v. Walker, 138 N.J. Super. 187, 350 A.2d 319 (1975) 7,9

Stanley v. Illinois, 405 U.S. 645 (1972) 17,18

State ex rel. Heller v. Miller, 61 Ohio St.2d 6, 399 N.E.2d 66 (1980) 11

State ex rel. Ortloff v. Hanson, 277 N.W.2d 205 (Minn. 1979) 11

Streater v. Little, No. 806 (Conn.App.Sess. Super.Ct. Feb. 29, 1980) cert.denied 180 Conn. 756 (1980) 1,2,7,9

In re Subler, 100 S.Ct. 1003 (1980) 10,11

United States v. Kras, 409 U.S. 434 (1973) . . . 12,13,16

Walker v. Stokes, 45 Ohio App.2d 275, 344 N.E.2d 159 (1975) 8,9

Walker v. Stokes, 54 Ohio App.2d 119, 375 N.E.2d 1258 (1977) 8,9

Wardius v. Oregon, 412 U.S. 470 (1973) 16

STATUTES

28 U.S.C. §1257 (2) 2,7

42 U.S.C. §654 14

Ala. Code tit. 26 §12-5 (1977) 7

Ark. Stat. Ann. §34-705.1 (1962) 7

Cal. Evid. Code §894 (Deering 1966) 7

Conn.Gen.Stat. §46b-160 (1979) 2

Conn.Gen.Stat. §46b-168 (1979) 1,2,3,5,6,7

Conn.Gen.Stat. §46b-169 (1979) 4

Conn.Gen.Stat. §46b-215 (1979) 9,13,14

Conn.Gen.Stat. §53-304 (1979) 9

1976 Conn.Pub.Acts. No.76-436 4

16 D.C. Code §2343 (1973) 7

1980 Ga.Laws No.1331 §1 (to be codified as Ga.Code §74-311)(effective July 1, 1980)... 8

Haw.Rev.Stat. §584-16 (1976) 7

Idaho Code §7-1117 (1979) 7

Ill. Rev. Stat. ch.106 3/4 §3(Supp. 1979) 7

Kan. Stat. §23-132 (1974) 7

La. Rev. Stat. Ann. §9:397.1 (West Supp. 1980)... 7

Me. Rev. Stat. tit. 19 §279 (Supp. 1979-80) . . . 8

Md. Ann. Code art. 16 §66G (Supp. 1979) 7

Mich. Stat. Ann. §25.496(c)(1974) 7

Miss. Code Ann. §93-9-25 (1972) 8

Nev. Rev. Stat. §56.020 (1979) 8

N.H. Rev. Stat. Ann. §522.3 (1974) 7

N.Y. Fam.Ct.Act §532 (McKinney Supp. 1976-79) ... 7

N.C. Gen. Stat. §8-50.1 (Supp. 1979) 7

N.D. Cent. Code §14-17-15 (Supp. 1977) 7

Ohio Rev. Code Ann. §3111.16 (Baldwin 1976) . . . 8

Or. Rev. Stat. §109.256 (1979) 7

42 Pa. Cons. Stat. Ann. §6132 (Purdon Supp. 1976) 8

R.I. Gen. Laws §15-8-13 (Supp. 1979) 8

Tenn. Code Ann. §24-716 (Supp. 1979) 8

Tex. Fam. Code Ann. §13.03 (Vernon Supp. 1980) . 7

Utah Code Ann. §78-25-23 (1977) 7

Va. Code §20-61.2 (Supp. 1979) 8

Wash. Rev. Code Ann. §26.26.140 (Supp. 1980-81) 8

Wis. Stat. Ann. §52.36(2) (West Supp. 1979-80) . 7

Wyo. Stat. §14-2-114 (1978) 8

OTHER AUTHORITIES

The Book of the General Laws for the People within the Jurisdiction of Connecticut (1673) 16

45 C.F.R. §232.12 (1979) 14

Ky. Op. Att'y Gen. 65-391 7

Krause, Joint AMA-ABA Guidelines: Present Status of Serological Testing in Problems of Disputed Parentage, 10 Fam.L.Q. 247 (1976) . . 11

Letter from Thomas W. McKean, Director, Indiana Child Support Division, Department of Public Welfare to IV-D Deputy Prosecuting Attorneys (December 4, 1979)(unpublished letter on file in the office of appellant's attorney). 8

Terasaki, Resolution By HLA Testing of 1000 Paternity Cases Not Excluded by ABO Testing, 16 J.Fam.L. 543 (1978) 11

U.S. Const. amend XIV §1 3

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v.

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ON APPEAL FROM THE APPELLATE SESSION
OF THE SUPERIOR COURT OF CONNECTICUT

JURISDICTIONAL STATEMENT

The appellant, Walter Little, appeals from a final judgment of the Appellate Session of the Superior Court of Connecticut, entered April 1, 1980, holding that Conn.Gen.Stat. §46b-168 (1979), which requires all defendants in paternity proceedings, irrespective of means, to pay for blood grouping tests in advance of trial, does not, as applied in this case, violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States.

OPINIONS BELOW

The opinion of the Appellate Session of the Superior Court of Connecticut, dated February 29, 1980, which appears at p. 1a of the Appendix hereto, is unreported. The April 1, 1980 Order of the Supreme Court of Connecticut denying certification is reported at 180 Conn. 756 (1980) and appears at p. 3a of the

Appendix. No opinions were filed by the Superior Court of Connecticut at the trial level.

JURISDICTION

This appeal involves a proceeding, brought by the appellee pursuant to Conn.Gen.Stat. §46b-160 (1979), to establish the paternity of a child born out of lawful wedlock.

The judgment of the Appellate Session of the Superior Court of Connecticut, affirming the judgment of the trial court that appellant was the father of the child in question in spite of the fact that the trial court denied appellant's motion, based on his indigency, that the cost of a blood grouping test be paid by the State of Connecticut, was entered on April 1, 1980. A Notice of Appeal to this Court, a copy of which appears at p. 4a of the Appendix hereto, was duly filed in the Appellate Session of the Superior Court of Connecticut on June 3, 1980.

The Jurisdiction of this Court is invoked under 28 U.S.C. §1257 (2), the validity of Conn.Gen.Stat. §46b-168 (1979) having been drawn into question on the ground of its being repugnant to the Constitution of the United States as applied in this case and the decision of the Appellate Session of the Superior Court of Connecticut being in favor of its validity.

CASES BELIEVED TO SUSTAIN THE JURISDICTION

The Appellate Session of the Superior Court of Connecticut explicitly viewed this case as drawing the validity of Conn.Gen. Stat. §46b-168 (1979), as applied in this case, into question and decided in favor of the statute's validity. See pp. 1a-2a of the Appendix hereto. For reasons discussed at pp.5-6 infra, although appellant raised his underlying constitutional claims at the earliest stage of the trial proceeding, the validity of the statute was first raised on appeal to the Appellate Session.

This Court has consistently held that there can be no question as to the proper presentation of a federal claim when the highest state court actually passes on it. See Boykin v. Alabama, 395 U.S. 238, 241-42 (1969); Coleman v. Alabama, 377 U.S. 129 (1964); Raley v. Ohio, 360 U.S. 423, 436-37 (1959); Whitney v. California, 274 U.S. 357, 360-63 (1927).

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the validity of Conn.Gen.Stat. §46b-168 (1979). That statute provides that:

> In any proceeding in which a question of paternity is an issue, the court, on motion of any party, may order the mother, her child and the putative father or the husband of the mother to submit to one or more blood grouping tests, to be made by a qualified physician or other qualified person, designated by the court, to determine whether or not the putative father or the husband of the mother can be excluded as being the father of the child. The results of such tests shall be admissable in evidence only in cases where such results establish definite exclusion of the putative father or such husband as such father. The costs of making such tests shall be chargeable against the party making the motion.

This case also involves the Due Process and Equal Protection Clauses of Section 1 of the Fourteenth Amendment to the Constitution of the United States. That section provides, in relevant part, that:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

QUESTION PRESENTED

In a paternity proceeding that the State of Connecticut caused to be instituted by a recipient of public assistance against an indigent, incarcerated defendant, does Conn.Gen.Stat. §46b-168 (1979) violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States when applied to deny the use of blood grouping tests to the defendant solely because of his indigency?

STATEMENT OF THE CASE

The appellee, Gloria Streater, instituted this paternity proceeding on July 11, 1977, in what was then termed the

Court of Common Pleas,[1] Geographical Area No.6, in New Haven, Connecticut (R.4).[2] She sought a judgment that the appellant, Walter Little, was the father of a female child, Kenyatta Chantel Streater, to whom she gave birth on May 21, 1975. At the time this action was instituted, appellee was a recipient of public assistance. As a requirement of continuing eligibility for such assistance, she was compelled to disclose the name of the putative father of her child to the Connecticut Department of Income Maintenance (Transcript of September 28, 1978, at 5-6). See Conn.Gen.Stat. §46b-169(1979). That agency then referred the instant case to her attorney for prosecution (R.29).

At the time this action was instituted, appellant was incarcerated in the Connecticut Correctional Institution, Enfield (Transcript of September 28, 1978, at 11). As a result of his incarceration he was indigent.[3] He consequently filed a Motion For Blood Grouping Test In Forma Pauperis on November 28, 1977 (R.8-11A). This Motion recited the facts of his indigency and requested a court order requiring appellee and her child to submit to a blood grouping test and a further order that the cost of such test be paid by the State of Connecticut.

1/ The Connecticut Court of Common Pleas was merged with the Superior Court of Connecticut on July 1, 1978, while this case was awaiting trial, pursuant to 1976 Conn.Pub.Acts No. 76-436§1.

2/ The record before the Appellate Session of the Superior Court of Connecticut consisted of a Record of various documents filed in the action, cited herein as "R.," and separately bound transcripts of proceedings in the trial court on December 5, 1977, and September 28, 1978.

3/ The trial court later specifically found appellant to be indigent. See Finding 8 (in an unpaginated portion of the Record).

On December 5, 1977, however, this Motion was denied by the Court to the extent that it requested that the cost of such tests be paid by the State (R.1).

The paternity action itself was tried before the Court[4/] on September 28, 1978. Appellant was still incarcerated at the time of trial and had been unable to afford a blood grouping test. Consequently, no such test was ever taken (Transcript of September 28, 1978, at 2). After the trial, on October 4, 1978, the Court entered an order finding that appellant was the father of the child in question (R.2).

At a hearing in damages, on October 16, 1978, the Court found appellant liable for a total of $6,974.48 for maintenance and support of the child in question and attorney's fees, payable to the Connecticut Department of Finance and Control (R.38-39).

The appellant appealed on the issue of whether the trial court erred in denying his Motion that the cost of a blood grouping test be paid by the State. On February 29, 1980, the Appellate Session of the Superior Court found no error. The Supreme Court of Connecticut denied certification on April 1, 1980.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

At the earliest stage of the proceedings below, the appellant raised the claim, in his Motion For Blood Grouping Test In Forma Pauperis, that the denial of an opportunity to obtain a blood grouping test because of his indigency "would deprive him of property without due process of law and deny to him the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States" (R.9). At this time, Conn.Gen.Stat. §46b-168 (1979), had not been construed as requiring the costs of blood grouping tests to be charged to the

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4/ It is settled law in Connecticut that defendants in paternity proceedings, irrespective of means, may obtain jury trials only upon payment of a fee. Robertson v. Apuzzo, 170 Conn. 367, 365 A.2d 824, cert. denied, 429 U.S. 852 (1976).

party moving for the tests irrespective of his means. Since the statute was not considered as controlling by the trial court or either of the parties[5/] there was no occasion at the trial level to draw its validity into question. The trial court's denial of appellant's Motion that the costs of blood grouping tests be paid by the State, however, plainly constituted a rejection of his constitutional claims.[6/]

Appellant appealed to the Appellate Session of the Superior Court of Connecticut, reiterating his consitutional claims in his Assignment of Errors. While the instant case was on appeal, however, the Appellate Session rendered its decision in Ferro v. Morgan, 35 Conn.Supp. 679, 406 A.2d 873, cert. denied, 177 Conn. 753, 399 A.2d 526 (1979). Ferro, for the first time, construed Conn Gen.Stat. §46b-168 (1979) as mandating that the costs of blood grouping tests in paternity cases be charged to the party moving for such tests, irrespective of his means,and upheld the constitutionality of this newly enunciated statutory requirement.

The Appellate Session considered appellant's constitutional claims in the instant case in the light of its intervening decision in Ferro v. Morgan. It explicitly considered those claims as drawing the constitutionality of §46b-168 into question. The first sentence of its short per curiam opinion expressly states that "This case presents ... the question of whether in a paternity proceeding General Statutes §46b-168 ... violates the due process and equal protection rights of an indigent

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5/ Conn.Gen.Stat. §46b-168 (1979) was not mentioned by the Court or either party during the hearing on appellant's Motion. Transcript of December 5, 1977.

6/ In Finding 13 (in an unpaginated portion of the Record), the trial court expressly "concluded" that the denial of a blood grouping test to an indigent defendant in a paternity action did not violate the Fourteenth Amendment to the Constitution of the United States.

defendant in such a proceeding." P.1a, infra. The Appellate Session expressly concluded that the statute does not violate these rights. In doing so, it plainly satisfied the jurisdictional requirements of 28 U.S.C. §1257 (2). The Supreme Court of Connecticut denied certification.

THE QUESTION IS SUBSTANTIAL

The most dramatic indicium of the substantial nature of the question presented by this appeal is the almost total isolation of Connecticut law on the issue of blood tests in paternity proceedings involving indigent defendants. Connecticut is one of just two states that statutorily require all defendants in paternity cases, irrespective of means, to pay for a blood test in advance of trial.[7/] Of the numerous judicial decisions

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7/ Connecticut and North Carolina are the only states that statutorily require the party requesting a blood test to pay for that test in advance. Conn.Gen.Stat. §46b-168(1979); N.C. Gen.Stat. §8-50.1 (Supp. 1979).

In contrast, twenty-four states and the District of Columbia expressly allow the costs of such tests to be charged to the State, county, municipality, or a public agency. Of these, eighteen states and the District of Columbia do so by statute. Ala. Code tit. 26§12-5 (1977); Ark. Stat. Ann. §34-705.1 (1962); Cal. Evid. Code §894 (Deering 1966), see Michael B. v. Superior Court, 86 Cal. App.3d 1006, 150 Cal.Rptr. 586 (1978); Haw. Rev. Stat. §584-16 (1976); Idaho Code §7-1117 (1979); Ill. Rev. Stat. ch.106 3/4 §3 (Supp. 1979); Kan. Stat. §23-132 (1974)(the fees are subsequently taxed as costs); La. Rev. Stat. Ann. §9:397.1 (West Supp. 1980); Md. Ann.Code art.16 §66G (Supp. 1979); Mich. Stat. Ann. §25.496 (c) (1974); N.H. Rev. Stat. Ann. §522.3 (1974); N.Y. Fam. Ct. Act §532 (McKinney Supp. 1976-79), see People ex rel. Van Epps v. Doherty, 261 App. Div. 86, 24 N.Y.S. 2d 821 (1941); N.D. Cent. Code §14-17-15 (Supp. 1977); Or. Rev. Stat. §109.256 (1979); 42 Pa. Cons. Stat. Ann. §6132 (Purdon Supp. 1979); Tex. Fam. Code Ann. §13.03 (Vernon Supp. 1980) (if the Texas Department of Human Resources "is a party of the suit"); Utah Code Ann. §78-25-23 (1977); Wis. Stat. Ann. §52.36 (2) (West Supp. 1979-80)(the fees are subsequently taxed as costs); 16 D.C. Code §2343 (1973). The Supreme Courts of Colorado, Massachusetts, and West Virginia have held payment by the State to be constitutionally required. Franklin v. District Court, 194 Colo. 189, 571 P.2d 1072 (1977), Commonwealth v. Possehl, 355 Mass. 575, 246 N.E.2d 667 (1969); Graves v. Daugherty, No. 14517 (W.Va. May 13, 1980). Such tests are judicially charged to the State in New Jersey by the inherent power of the courts in that State. Smith v. Walker, 138 N.J.Super. 187, 350 A.2d 319 (1975). Such tests are charged to the State in Kentucky by virtue of Ky. Op. Att'y Gen. 65-391. In Indiana, it is the

that have considered the constitutionality of this practice,

7/ continued

policy of the Department of Public Welfare to pay for blood tests where the prosecuting attorney requests such a test or where the parties stipulate that the test results will be admitted into evidence. Letter from Thomas W. McKean, Director, Indiana Child Support Division, Department of Public Welfare to IV-D Deputy Prosecuting Attorneys (December 4, 1979)(unpublished letter on file in the office of appellant's attorney).

In addition, the statutes of five states give the courts of those states unlimited power to determine how and by whom such costs shall be paid. Me. Rev. Stat. tit. 19§279 (Supp. 1979-80); Miss. Code Ann. §93-9-25 (1972); Nev. Rev. Stat. §56.020 (1979); Ohio Rev. Code Ann. §3111.16 (Baldwin 1976); R.I. Gen. Laws §15-8-13 (Supp. 1979). These statutes clearly provide local courts with the necessary authority to order that such costs be paid by the state where one or both of the parties are indigent. Ohio courts have not, however, been in agreement on whether that state should be charged in cases involving indigent defendants. Compare Walker v. Stokes, 45 Ohio App.2d 275, 344 N.E.2d 159 (1975)(holding such payment to be constitutionally required) with Bigsby v. Bates, 59 Ohio Misc. 51, 391 N.E.2d 1384 (C.P. 1978)(holding free blood tests not required in light of Walker v. Stokes, 54 Ohio App.2d 119, 375 N.E.2d 1258 (1977)(stripping state of its power to jail for nonsupport)).

Somewhat more ambiguously, the statutes of five more states simply provide that local courts "may" in their discretion, order such costs to be paid by the parties. 1980 Ga. Laws No.1331 §1 (to be codified as Ga. Code §74-311)(effective July 1, 1980); Tenn. Code Ann. §24-716 (Supp. 1979); Va. Code §20-61.2 (Supp. 1979); Wash. Rev. Code Ann. §26.26.140 (Supp. 1980-81); Wyo. Stat. §14-2-114 (1978). These statutes appear to provide local courts with at least some authority to charge such costs to the state where one or both of the parties are indigent.

Although the relevant statutes in Minnesota are unclear, courts in that state would, in all probability, order such payment by virtue of Hepfel v. Bashaw, 279 N.W.2d 342 (Minn. 1979)(giving indigent putative fathers the right to a free attorney). The laws of the remaining thirteen states (Alaska, Arizona, Delaware, Florida, Iowa, Missouri, Montana, Nebraska, New Mexico, Oklahoma, South Carolina, South Dakota, and Vermont) are simply unclear.

moreover, those of the Appellate Session of the Superior Court of Connecticut are, with a single exception involving an idiosyncratic Ohio law, the only ones upholding it.[8/] Thus, the

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8/ The Appellate Session of the Superior Court of Connecticut has held that the state is not constitutionally required to provide blood tests to indigent putative fathers in three decisions: Ferro v. Morgan, 35 Conn. Supp. 679, 406 A.2d 873, cert. denied, 177 Conn. 753, 399 A.2d 526 (1979), Knox v. Siddell, No.734 (Conn. App. Sess. Super. Ct. March 16, 1979); and the instant case. In contrast, courts have held that the state is constitutionally required to provide such tests in Franklin v. District Court, 194 Colo. 189, 571 P.2d 1072 (1977); Commonwealth v. Possehl, 355 Mass. 575, 246 N.E.2d 667 (1969); Lascaris v. Lardeo, 100 Misc.2d 220, 417 N.Y.S.2d 665 (Fam. Ct. 1979); Walker v. Stokes, 45 Ohio App. 2d 275, 344 N.E.2d 159 (1975); and Graves v. Daugherty, No. 14517 (W.Va. May 13, 1980). See Madeline G. v. David R., 95 Misc. 2d 273, 407 N.Y.S.2d 414 (Fam. Ct. 1978)(giving indigent putative fathers the constitutional right to counsel at no cost). Cf. M.v.S., 169 N.J. Super. 209, 404 A.2d 653 (1979); Lurry v. Mills, 152 N.J. Super. 127, 377 A.2d 804 (1977); Smith v. Walker, 138 N.J. Super. 187, 350 A.2d 319 (1975)(giving indigent putative fathers the right to a blood test by virtue of the inherent powers of the New Jersey Courts but drawing extensively on constitutional precedent and reasoning.

The single exception to this unbroken line of cases in other states is Bigsby v. Bates, 59 Ohio Misc. 51, 391 N.E.2d 1384 (C.P. 1978), holding that free blood test are not required in Ohio in light of Walker v. Stokes, 54 Ohio App. 2d 119, 375 N.E. 2d 1258 (1977)(stripping Ohio of its power to jail for nonsupport). Because Bigsby is merely a memorandum of a single trial judge its authority is limited even in Ohio. It plainly has no relevance to states such as Connecticut which retain full power to jail for nonsupport. See Conn.Gen.Stat. §§46b-215, 53-304 (1979).

issue in the instant case does not merely involve a direct conflict among state appellate courts, although the decision of the Appellate Session below is in obvious conflict with such cases as Franklin v. District Court, 194 Colo. 189, 571 P.2d 1072 (1977), and Commonwealth v. Possehl, 355 Mass. 575, 246 N.E.2d 667 (1969). Rather, from the objective evidence of the country's present judgment concerning the provision of blood tests to indigent defendants in paternity cases, see nn. 7 & 8 supra, this is an appeal from a decision that is well outside the mainstream of American jurisprudence.

Appellant's principal claim is that, given the distinctive nature of paternity proceedings and the remarkable effectiveness with which modern blood tests conclusively exonerate falsely accused defendants in such proceedings, the denial of a blood test to a putative father solely because of his indigency is the denial of a fundamental constitutional right. While this is a preposition in which a clear majority of American courts and legislatures concur, the question is a novel and substantial one before this Court. It is of particular importance because it stands at the juncture of two lines of constitutional precedent - one line of cases dealing with the rights of civil plaintiffs, see Boddie v. Connecticut, 401 U.S. 371 (1971), and the other with the rights of criminal defendants, see Griffin v. Illinois, 351 U.S. 12 (1956).

The constitutional rights of indigent civil defendants, particularly in proceedings involving family rights and potential future criminal sanctions, have not been directly addressed by this Court. It was presumably to consider this hitherto disregarded middle category that the Court granted certiorari earlier this term in In re Subler, 100 S.Ct. 262 (1979), to consider the question, "Does dismissal of appeal as

of right caused by denial of free transcript and court appointed attorney for 'ndigent mother seeking to appeal order permanently terminating parental custody violate Due Process and Equal Protection Clauses?" 48 U.S.L.W. 3316 (U.S. Nov. 6, 1979)(No. 79-5215). The Court, however, subsequently remanded Subler to the Ohio Court of Appeals for further consideration in light of State ex rel. Heller v. Miller, 61 Ohio St. 2d 6, 399 N.E.2d 66 (1980), see 100 S.Ct. 1003 (1980), leaving the fundamental constitutional questions involved unresolved by this Court. The instant case now presents these fundamental questions in a particularly compelling context. When the merits of the question presented are considered, the dramatic isolation of Connecticut law becomes readily understandable.

This Court held in Boddie v. Connecticut, supra, 401 U.S. at 377, "that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." A recent scientific "revolution"[9/] in the use of blood group systems in cases of disputed paternity has rendered the use of blood tests an absolutely essential component of "a meaningful opportunity to be heard" in paternity proceedings. Standard blood tests can now readily exclude,at a reasonable cost, 91% of falsely accused putative fathers, in the case of blacks, and 93% in the case of whites. Krause, Joint AMA-ABA Guidelines: Present Status of Serological Testing in Problems of Disputed Parentage, 10 Fam. L. Q. 247, 258 Table 3 (1976). See Hepfel v. Bashaw, 279 N.W. 2d 342, 347 (Minn. 1979); State ex rel. Ortloff v. Hanson, 277 N.W. 2d 205, 207 (Minn. 1979); Lascaris v. Lardeo, 100 Misc. 2d 220, 222, 417 N.Y.S.2d 665, 666 (1979).

9/ Terasaki, Resolution By HLA Testing Of 1000 Paternity Cases Not Excluded By ABO Testing, 16 J. Fam. L. 543, 543 (1978). The revolution involves the introduction of the HLA - standing for human, leukocyte (white blood cell), antigen - system of testing. For a discussion of the basic principles of HLA testing see Cramer v. Morrison, 88 Cal. App. 3d 873, 153 Cal. Rptr. 865 (1979); Terasaki, supra.

Where a standardized, universally recognized laboratory test, that conclusively establishes nonpaternity in more than 90% of all cases involving falsely accused defendants is readily available, the denial of that test to indigent defendants is the denial of "a meaningful opportunity to be heard." Without it, the indigent defendant is placed in a swearing contest with the plaintiff[10/] in which a judge[11/] must, often desperately, rely on his subjective instincts, rather than hard scientific data, as to which witness is telling the truth. "[A]bsent a countervailing state interest of overriding significance," this denial of an effective defense is a denial of due process as surely as was the denial of access to divorce court in Boddie. Here, as in Boddie, the State's only legitimate countervailing interest is "resource allocation or cost recoupment." 401 U.S. at 382. This justification was offered and rejected in Boddie. It is, if anything, even less convincing here, where, as discussed infra, the State is aggressively using the judicial system to gain monetary judgments from indigent defendants. This justification should be rejected.

This basic constitutional requirement is unaffected by United States v. Kras, 409 U.S. 434 (1973)(refusing to waive filing fees to an indigent petitioner in bankruptcy), and Ortwein v. Schwab, 410 U.S. 656 (1973)(refusing to waive filing

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10/ In Connecticut, moreover, this swearing contest is one that is heavily biased in favor of the plaintiff. See the discussion of Connecticut paternity law at pp.16-17, infra.

11/ Not, in Connecticut, a jury. See n.4 supra.

fees to an indigent wishing to appeal a denial of welfare benefits), for a number of reasons. These reasons involve both the obvious fact that the petitioners in those actions were plaintiffs, who have not been forced into the judicial process to resolve their difficulties, and certain distinctive features of paternity proceedings. These factors are enumerated below. Taken together, they implicate a variety of constitutional rights that are at least as fundamental as those involved in Boddie and are arguably even more basic to our constitutional system.

First. This action involves the denial of an essential item of evidence to a defendant. The appellant here did not choose to file a legal action as one of several available paths to relief. Rather, he was summoned to court against his will by the appellee. Boddie turned, in large part, on the fact that the plaintiffs in that case were compelled to go to court to resolve their difficulties. See United States v. Kras, supra, 409 U.S. at 445. That factor is surely present here. In fact, in the respect that his presence in court is wholly involuntary, appellant stands in exactly the same position as a defendant in a criminal action.

Second. In Connecticut, as in most states, a losing defendant in a paternity proceeding becomes subject to a number of potential criminal and quasi-criminal sanctions not present in the ordinary civil case.[12/] The appellant here has, of course, already been found liable for thousands of dollars in support payments and is obligated to provide support for the child in question for the duration of her minority. Conn.Gen.Stat. §46b-215 (a) (1979). Should he subsequently fail to comply with any

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12/ The perhaps unparalleled absence of such sanctions in Ohio was the basis of Bigsby v. Bates, discussed in n.8 supra.

support order he will be subject to imprisonment for contempt of court. Id. He will further be subject to criminal prosecution and imprisonment for nonsupport. Conn.Gen.Stat. §53-304 (1979). Thus, his liberty, as well as property, interests are plainly implicated by the paternity proceeding that is the subject of this appeal.[13/]

Third. Although the instant case is nominally a private affair, it is in fact a case in which the full power of the State has been brought against an indigent defendant in a judicial proceeding. The State, of course, lurks in the background of every paternity proceeding in Connecticut by virute of the potential criminal and contempt sanctions discussed supra. But, in the instant case, the State is much more directly involved. Because the appellee is a recipient of public assistance, she was compelled to disclose the name of the putative father of her child to the Connecticut Department of Income Maintenance. Conn.Gen.Stat. §46b-169 (1979). That state agency then referred the instant case to her attorney for prosecution (R.29). The state not only paid appellee's attorney to prosecute the appellant, but is the actual recipient of the several thousand dollars of support money awarded by the trial court (R.38-39).[14/] Moreover, as a practical matter, the appellant in this case was necessarily rendered indigent by his incarceration by the State. The State was thus involved in the practical aspects of the litigation below in almost every conceivable way.

As this Court has stated in a somewhat different context, "Conduct that is formally 'private' may become so entwined with

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13/ Although the Supreme Court of Connecticut has chracterized paternity proceedings as "civil" rather than "criminal" in Robertson v. Apuzzo, n.4 supra, such an adroit act of pigeonholing in no way erases either the existence of the criminal and quasi-criminal sanctions discussed in the text or the fact that these sanctions are not involved in the ordinary civil case. It is, of course, implicit in our entire argument that paternity proceedings are demonstrably different from garden-variety civil litigation and that the civil/criminal distinction is therefore hardly talismanic.

14/ This procedure is required by 42 U.S.C. §654(4). See 45 C.F.R.§232.12 (1979).

governmental policies or so impregnated with a governmental chracter as to become subject to the constitutional limitations placed upon state action ." Evans v. Newton, 382 U.S. 296, 299 (1966). See Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). Such "state action" permeated the entire proceeding in the instant case. Because of this undeniable fact, the legal actions of the appellee, ostensibly a private citizen, were essentially the actions of the State for purposes of the Fourteenth Amendment.[15/]

The three factors of involuntariness, potential criminal sanctions, and state action, taken together, strongly indicate that a celebrated line of this Court's decisions, involving the rights of indigent criminal defendants, is applicable to the instant case. In Griffin v. Illinois, 351 U.S. 12 (1956), this Court held that the Fourteenth Amendment compels a State to furnish a state-paid transcript of his criminal trial to an indigent criminal defendant on appeal. Noting the disparity between the ability of indigent and non-indigent defendants to obtain adequate appellate review under then-existing practice, a plurality of the Court decided the case on the broad ground that "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." 351 U.S. at 19 (plurality opinion of Mr. Justice Black). Following Griffin, the Court required the provision of appointed counsel on an appeal as of right from a criminal conviction in Douglas v. California, 372 U.S. 353 (1963). The principle of these cases has been extended to matters needed for pretrial preparation, see Britt v. North Carolina, 404 U.S. 226 (1971); Roberts v. LaVallee, 389 U.S. 40 (1967), and, of particular

---

15/ See Madeline G. v. David R., 95 Misc. 2d 273, 275-76, 407 N.Y.S.2d 414, 416 (Fam.Ct. 1978).

relevance to this appeal, even to a case involving a mere $250 fine, see Mayer v. City of Chicago , 404 U.S. 189 (1971).

While criminal defendants stand on a particularly exalted constitutional plane for obvious reasons, the underlying principles involved in the Griffin-Roberts-Britt-Mayer line of cases are plainly relevant to the instant case. Here, as in those cases, the full power of the State has been brought against an indigent defendant in a judicial proceeding. And here, as in those cases, the defendant, because of his indigence, has been deprived of a necessary means of presenting his case. Under these circumstances, "The balance of forces between the accused and his accuser," Wardius v. Oregon, 412 U.S. 470, 474 (1973), is so disproportionate as to smack of fundamental unfairness.

In addition to the three factors of involuntariness, potential criminal sanctions, and state action that analogize the instant case to Griffin and its progeny, certain other factors exist that further distinguish the instant case from United States v. Kras, supra, and Ortwein v. Schwab, supra. These factors involve the distinctive nature of paternity proceedings. Considered in conjunction with the forgoing factors, they leave no doubt that Conn.Gen.Stat. §46b-168 (1979), as applied in this case, is inconsistent with the dictates of the Fourteenth Amendment.

Fourth. In Connecticut, a defendant in a paternity proceeding must bear a unique evidentiary burden. Since the enactment of Connecticut's original Bastardy statute in 1672,plaintiffs and defendants in paternity actions have been placed in dramatically unequal positions. Under the original statute, "the man charged by the Woman to be the Father, she holding constant in it" was deemed to "be the reputed Father" and, ipso facto, "liable to the charge of maintenance...notwithstanding his denyal."[16/] Despite several intervening statu-

16/ See The Book of the General Laws for the People within the Jurisdiction of Connecticut 6 (1673).

tory changes, the Connecticut Supreme Court held in Booth v. Hart, 47 Conn. 480, 485 (1876), that once the plaintiff in a paternity proceeding has established a prima facie case, "the burden of proof then changed to the defendant, and he was required to prove himself innocent of the accusation by other evidence than his own." (Emphasis added.) This rule was reaffirmed in Mosher v. Bennett, 108 Conn. 671, 674, 144 A. 297, 298 (1929). Under this rule, a defenant's own testimony, regardless of his credibility, is legally insufficient to outweigh the plaintiff's testimony in the pans of justice. See Kelsaw v. Green, 6 Conn. Cir. Ct. 516, 276 A.2d 909 (App. Div. Cir. Ct. 1971). Given this evidentiary requirement, a blood grouping test is even more important to the defendant than it would otherwise be, and the balance of forces in a proceeding against an indigent becomes egregiously unfair.

Fifth. Paternity proceedings by their nature involve the family rights of unwed father, a right that this court is increasingly recognizing as significance. See Caban v. Mohammed, 441 U.S. 380 (1979); Stanley v. Illinois, 405 U.S. 645 (1972). This case, to be sure, is in many ways the converse of Caban and Stanley. The fathers in those cases were attempting to assert their parental rights, while the appellant here denies that he is, in fact, a parent. But the fundamental rights of parentage are nevertheless involved, for as a result of this paternity action both appellant and the child in question have been saddled with a parent-child relationship. The State's only interest in initiating this proceeding was, of course, financial, but a binding determination of parentage ineluctably carries with it a host of legal, moral, and emotional consequences that perhaps cannot even be forseen at the present time. Under these circumstances, it is in the interest of all parties and society as well that, if a parent-child relationship exists,

its existence be determined accurately. To deny a defendant an accurate determination of his paternity solely because of his poverty "needlessly risks running roughshod over the important interests of both parent and child." Stanley v. Illinois, supra, 405 U.S. at 657. Such a denial is inconsistent with the fundamental requirements of the Fourteenth Amendment.

Finally. Given the factors discussed supra, the ultimate result of Connecticut's blood test law is to create a particularly egregious dual system of justice that has a substantial, adverse, and recurring impact on a significant number of defendants in paternity proceedings.[17/] Because of the extraordinary frequency with which modern blood grouping tests conclusively exclude falsely accused putative fathers there is, needless to say, no question that nonindigent defendants who dispute their paternity will utilize these tests. In return for the payment of a modest laboratory fee, a falsely accused nonindigent defendant is overwhelmingly likely to obtain a swift, scientific, and absolutely unimpeachable exoneration. The indigent defendant, on the other hand is placed in a swearing contest with the plaintiff in which the pans of justice are loaded against him. In such a contest even the fairest and most conscientious judge can rarely claim that he has rendered a decision not open to doubt. There are, consequently, two dramatically different systems of justice: a reliable one for defendants with assets and an unreliable one for the poor. The observation of Mr. Justice Frankfurter in his concurring opinion in Griffin v. Illinois, supra, 351 U.S. at 23-24, is particularly appropriate to this state of affairs:

17/ Although it may seem anomalous that scarce legal resources are regularly exmployed to institute suits for money judgments against indigent defendants, this result could hardly be otherwise in a state which is compelled to initiate paternity actions in behalf of mothers receiving public assistance. See n.14, supra, and accompanying text. It is unlikely that such recipients will have intimately associated with people of means.

To sanction such a ruthless consequence, inevitably resulting from a money hurdle erected by a State, would justify a latter-day Anatole France to add one more item to his ironic comments on the "majestic equality" of the law. "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."

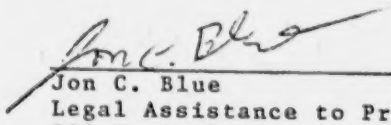
....

The State is not free to produce such a squalid discrimination.

CONCLUSION

For these reasons, the Court should note probable jurisdiction of this appeal.

Respectfully submitted,



Jon C. Blue
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Counsel for Appellant

June 12, 1980

APPENDIX

APPELLATE SESSION OF THE SUPERIOR COURT

December, 1979, at Hartford

A.S. 806

GLORIA STREATER v. WALTER LITTLE

Argued: December 19, 1979 Decided: February 29, 198

Paternity action brought to the Court of Common Pleas in New Haven County where the court, Melville, J., granted the defendant's motion for a blood grouping test but ordered the cost of such test not to be paid by the state; the court, Schaller, J., adjudged the defendant to be the father of the plaintiff's minor child and the defendant appeals. No error.

Jon C. Blue, for the appellant (defendant).

Stephen J. McGovern, assistant attorney general, for the appellee (state).

PER CURIAM. This case presents for the third time before this court the question of whether in a paternity proceeding General Statutes § 46b-168, which makes the costs of blood grouping tests chargeable against the party moving for such tests, violates the due process and equal protection rights of an indigent defendant in such a proceeding. In Ferro v. Morgan, 35 Conn. Sup. 689, cert. denied, 177 Conn. 753, 399 A.2d 526 (1979), we addressed and specifically rejected these constitutional claims. In Knox v. Siddell, Conn. Sup. (App. Sess. No.734, Decided March 16, 1979), we again considered these claims

and as an alternative ground ruled that our decision was controlled by Ferro v. Morgan, supra. No new arguments or authorities have been presented to us in this case which would persuade us to come to a different result.

There is no error.

PARSKEY, D. SHEA and BIELUCH, Js., participated in this decision.

Date of Judgment - February 29, 1980
Counsel Notified - February 29, 1980

Alfred J. Graziolo
Assistant Clerk -
Appellate

PEDIMENT HOMES, INC. *v.* FLOYD RUSSELL ET AL.

The plaintiff's petition for certification for appeal from the Appellate Session of the Superior Court is granted by the court.

Stephen C. Gallagher, in support of the petition.
David P. Ball, in opposition.

Decided April 1, 1980

180 *Conn.* 756

KERMIT ADAMS, TRUSTEE, ET AL. *v.* PLANNING COMMISSION OF THE TOWN OF BETHLEHEM

The defendant's petition for certification for appeal from the Superior Court in the judicial district of Waterbury is denied by the court.

David B. Losee, in support of the petition.
James R. Healey, in opposition.

Decided April 1, 1980

WILLIAM CIBES ET AL. *v.* STATE TRAFFIC COMMISSION ET AL.

The plaintiffs' petition for certification for appeal from the Superior Court in the judicial district of New London is denied by the court.

Timothy D. Bates and *Myron B. Bell*, in support of the petition.

Frank Rogers, assistant attorney general, and *Elizabeth R. Collins*, in opposition.

Decided April 1, 1980

GLORIA STREATER *v.* WALTER LITTLE

The defendant's petition for certification for appeal from the Appellate Session of the Superior Court is denied by the court.

Jon C. Blue, in support of the petition.

Stephen J. McGovern, assistant attorney general, in opposition.

Decided April 1, 1980

180 *Conn.* 757

CHRISTINE S. KUEHN *v.* BRIDGEPORT HOSPITAL ET AL.

The defendants' petition for certification for appeal from the Superior Court in the judicial district of Fairfield at Bridgeport is denied by the court.

Paul E. Pollock, in support of the petition.
Frederick J. Martin, in opposition.

Decided April 2, 1980

JAMES E. SMITH *v.* ZONING BOARD OF APPEALS OF THE CITY OF MILFORD ET AL.

The petition of New Haven Bird Club, Inc., for certification for appeal from the Superior Court in the judicial district of Ansonia-Milford is denied by the court.

Daniel Millstone, in support of the petition.

Decided April 2, 1980

STATE OF CONNECTICUT *v.* NICHOLAS ROMANO

The defendant's petition for certification for appeal from the Appellate Session of the Superior Court is denied by the court.

Nicholas Romano, pro se, in support of the petition.

Decided April 15, 1980

LAWRENCE MATTO ET AL. *v.* FRANK R. CARDASSI ET AL.

The defendants' petition for certification for appeal from the Appellate Session of the Superior Court is denied by the court.

Robert W. Lotty, in support of the petition.

Decided April 15, 1980

180 *Conn.* 758

BETHEL ASSEMBLY OF GOD, INC. *v.* ZONING BOARD OF APPEALS OF THE TOWN OF TRUMBULL

The petition of William W. Joslin et al. for certification for appeal from the Superior Court in the judicial district of Fairfield at Bridgeport is denied by the court.

Harold Sobel, in support of the petition.
Gary W. Nicholson, in opposition.

Decided April 29, 1980

HERBERT A. JOHNSON ET AL. *v.* PLANNING AND ZONING COMMISSION OF THE TOWN OF TRUMBULL ET AL.

The plaintiffs' petition for certification for appeal from the Superior Court in the judicial district of Fairfield at Bridgeport is denied by the court.

Raymond W. Beckwith, in support of the petition.
Stewart I. Edelstein and *Burton S. Yaffie*, in opposition.

Decided April 29, 1980

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SUPREME COURT, U.S.

No. 79-6779

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

WALTER LITTLE,
Appellant

ORIGINAL COPY

v.

GLORIA STREATER,
Appellee

ON APPEAL FROM THE APPELLATE SESSION
OF THE SUPERIOR COURT OF CONNECTICUT

SUPPLEMENTAL BRIEF

Jon C. Blue
Legal Assistance to Prisoners
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Counsel for Appellant

July 25, 1980

No. 79-6779

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

WALTER LITTLE,
Appellant

v.

GLORIA STREATER,
Appellee

ON APPEAL FROM THE APPELLATE SESSION
OF THE SUPERIOR COURT OF CONNECTICUT

SUPPLEMENTAL BRIEF

Since the filing of the Jurisdictional Statement in this appeal, the May 18, 1980 decision of the Supreme Court of Appeals of West Virginia referred to in the Jurisdictional Statement at 7 n.7 and 9 n.8 has been published. State ex rel. Graves v. Daugherty, 266 S.E.2d. 142 (W.Va. 1980). Daugherty holds that the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States requires that "When a State grants the right to blood tests to a paternity defendant, that right cannot be made dependent upon his financial resources." 266 S.E.2d at 146.

Daugherty obviously adds to the virtually complete rejection of the Connecticut blood test rule by the courts and legislatures of this country. See Jurisdictional Statement at 7-10. The substantive arguments set forth in the Appellee's Motion To Dismiss Or Affirm have already been adequately addressed in the Jurisdictional Statement. It must be emphasized, however, that every state appellate court outside of Connecticut that has considered the issue has unanimously held that the denial of blood grouping tests to indigent defendants in paternity proceedings violates the Fourteenth Amendment. See Franklin v. District Court, 194 Colo. 189, 571 P.2d 1072 (1977); Commonwealth v. Possehl, 355 Mass. 575, 246 N.E.2d 667 (1969); Walker v. Stokes, 45 Ohio App. 2d 275, 344 N.E.2d 159 (1975); State ex rel. Graves v. Daugherty, supra. See generally Jurisdictional Statement at 9 n.8. In light of this widespread acceptance of Appellant's constitutional position, the question presented in this appeal can hardly be considered "so unsubstantial as not to need further argument." Motion To Dismiss Or Affirm at 1.

Respectfully submitted,

Jon C. Blue
Legal Assistance to Prisoners
340 Capitol Avenue
Hartford, Connecticut 06106
(203) 566-2030
Counsel for Appellant

July 25, 1980

No. 79-6779

In the Supreme Court of the United States

OCTOBER TERM 1980

WALTER LITTLE, APPELLANT,

v.

GLORIA STREATER, APPELLEE

APPEAL FROM THE APPELLATE SESSION OF THE SUPERIOR COURT OF CONNECTICUT

JOINT APPENDIX

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APPEAL DOCKETED JUNE 16, 1980
PROBABLE JURISDICTION NOTED OCTOBER 6, 1980

TABLE OF CONTENTS

	Page
Docket Entries	1
Complaint	3
Motion For Blood Grouping Test In Forma Pauperis	5
Sworn Financial Statement	7
Order	8
Motion For Disclosure And Production	9
Plaintiff's Disclosure & Production	10
Answer	11
Excerpts From Trial Testimony	12
Judgment	20
Finding	22
Correction Of Finding	24
Opinion of the Appellate Session of the Superior Court of Connecticut	25
Order of the Supreme Court of the United States Granting Motion for Leave to Proceed in forma pauperis and Granting Petition for Writ of Certiorari	27

COURT OF COMMON PLEAS
COUNTY OF NEW HAVEN
GEOGRAPHICAL AREA No. 6

Docket No. CV-6-7708-7153 9 PA

GLORIA STREATER

v.

WALTER LITTLE

DOCKET ENTRIES

Dates	Proceedings
[8-10-77]	[Complaint]
* * *	
11-28-77	Motion for Blood Grouping Test in Forma Pauperis
11-28-77	Financial Affidavit filed
* * *	
12-5-77	Motion for Blood Test granted—Not to be paid for by the State of Conn. Melville, J.
12-6-77	Parties notified
* * *	
12-28-77	MOTION FOR DISCLOSURE FILED 12-28-77 BY defts atty ORDER ENTERED 12-29-77 BY CLERK THAT MOTION BE COMPLIED WITH WITHIN THREE WEEKS FROM SAID DATE. COUNSEL NOTIFIED 12-29-77
* * *	
7-24-78	Pltf's Disclosure & Production filed
* * *	
8-15-78	Answer filed
8-18-78	Claim for trial

8-23-78	Over to Sept 28, 1978 Thurs 2PM Mancini, J.
10-4-78	After hearing, the Court finds that the defendant is the father of the child, Kenyatta Chantel Streater. Judgment entered accordingly. Hearing in damages to be held. Schaller
10-5-78	Parties notified
10-5-78	Hearing in Damages on Oct. 16, 1978 at 10 am.
10-11-78	Appl for Relief from payment of fees, costs & expenses on appeal filed
10-11-78	granted Schaller, J.
10-16-78	Financial statement
10-16-78	Jmt to file. Freedman, J.
10-18-78	Jmt filed
10-19-78	Appeal (copies to all parties)

COURT OF COMMON PLEAS
NEW HAVEN

GLORIA STREATER

v.

WALTER LITTLE

JULY 11, 1977

TO THE COURT OF COMMON PLEAS IN AND FOR THE COUNTY OF NEW HAVEN, comes GLORIA STREATER, residing in the Town of New Haven in the County of New Haven and State of Connecticut, and complains and says:

1. For all her life up through the present, she has been a single woman.

2. On May 21, 1975, at New Haven, she gave birth to a male child, Kenyatta, begotten on or about August 21, 1974, at New Haven by WALTER LITTLE of Somers/Enfield, Connecticut.

WHEREFORE, the said GLORIA STREATER prays that this Honorable Court adjudge that said WALTER LITTLE is the father of said child and enter judgment in accordance with the statutes in such cases made and provided.

Dated at New Haven, Connecticut, this 11th day of July, 1977.

/s/ _____
GLORIA STREATER

STATE OF CONNECTICUT
COUNTY OF NEW HAVEN

ss.

NEW HAVEN

July 11, 1977

Personally appeared GLORIA STREATER who, being duly sworn, made oath that the facts stated in the foregoing petition are true.

/s/ _____
PAUL M. SABETTA
Commissioner of the Superior Court

(Entry of appearance, recognizance, and summons omitted in printing.)

COURT OF COMMON PLEAS
G.A. No. 6

No. CV6-71539

GLORIA STREATER

v.

WALTER LITTLE

MOTION FOR BLOOD GROUPING TEST IN FORMA PAUPERIS—NOVEMBER 25, 1977

The Defendant respectfully states:

1. That this case involves a question of paternity.

2. That Conn. Gen. Stat. § 52-184 provides that the Court may order the mother, her child, and the putative father to submit to one or more blood grouping tests, to be made by a qualified physician or other qualified person, designated by the Court, to determine whether or not the putative father can be excluded as being the father of the child.

3. That a blood grouping test provides the principle and most effective defense to a paternity action.

4. That the Defendant, who is presently incarcerated in the Connecticut Correctional Institution, Enfield, is financially unable to pay the cost of a blood grouping test and has no means by which he can raise funds for such a test. (A Financial Affidavit stating Defendant's income, assets, liabilities, and expenses is attached hereto.)

5. That if the Defendant is denied the opportunity to obtain a blood grouping test because of his indigency he will be severely restricted in his ability to defend this action, and that such restriction would deprive him of property without due process of law and deny to him the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

WHEREFORE, the Defendant petitions the Court for an order requiring the Plaintiff and her child to submit to a

blood grouping test by a physician of the Defendant's choice and for a further order that the cost of said tests be paid by the State of Connecticut.

DEFENDANT
WALTER LITTLE

/s/ By: _____
JON C. BLUE
His Attorney

COURT OF COMMON PLEAS, G. A. NO. 6

DOCKET NO. CV6-71539

GLORIA STREATER, PLAINTIFF

v.

WALTER LITTLE, DEFENDANT

Date November 25, 1977

Sworn Financial Statement

Financial Affidavit

Plaintiff ☐ Defendant ☒

* * * * *

V. SUMMARY

A. Total Weekly Net Income (All Sources)	$5
B. Total Cash Value of All Assets	$0
C. Total Liabilities	$0
D. Total Weekly Expenses	$5

VI. CERTIFICATION

I hereby certify that the foregoing statement is accurate to the best of my knowledge and that I can, if requested, submit documentation for all assets, liabilities, and expenses listed above.

/s/ _____

WALTER LEE LITTLE

Affiant

Sworn and subscribed to before me

/s/ _____

JON C. BLUE

Commissioner of Superior Court

November 25, 1977

Date

ORDER

The foregoing motion having been heard and it appearing that it should be granted, it is

ORDERED that the Plaintiff and her child submit to a blood grouping test by a physician of the Defendant's choice, the arrangements for such test to be left to counsel for the respective parties.

ORDERED that the cost of said test not to be paid by the State of Connecticut.

By the Court

/s/ _____

MELVILLE, J.

Assistant Clerk

December 5, 1977

(Certificate of service omitted in printing.)

COURT OF COMMON PLEAS, G.A. #6
AT NEW HAVEN
NO. CV6-71539

GLORIA STREATER

v.

WALTER LITTLE

MOTION FOR DISCLOSURE AND PRODUCTION—DECEMBER 22, 1977

The Defendant in the above-entitled action moves pursuant to § 168 of the Connecticut Practice Book for an order requiring the Plaintiff to file with the Clerk of the Court answers to the following interrogatories. The Defendant respectfully represents that the following information will be of assistance in the preparation of his defense and that said information, if not within the exclusive knowledge or power of the Plaintiff, can be provided by the Plaintiff with substantially greater facility than it could be otherwise obtained by the Defendant. The Defendant, therefore, moves for an order as follows:

A. An order requiring the Plaintiff to answer the following interrogatories and to file said answer with the clerk of the Court:

* * *

57.* State the name of the person or persons who first advised you to institute this paternity proceeding.

* * *

DEFENDANT
WALTER LITTLE
/s/ By: _____
JON C. BLUE
His Attorney

(Certificate of service omitted in printing.)

[*N.B. This is a typographical error. This is the 59th interrogatory and was answered as such.]

SUPERIOR COURT CIVIL DIVISION GA. 6
NEW HAVEN JUDICIAL DISTRICT

NO. CV6-71539

GLORIA STREATER

vs.

WALTER LITTLE

PLAINTIFF'S DISCLOSURE & PRODUCTION—
JULY 20, 1978

Answers to Interrogatories

* * *

59. Plaintiff's continuing eligibility for state assistance required her to disclose father's identity. Case referred to plaintiff's attorney for prosecution by Social Services Dept.

* * *

THE PLAINTIFF

/s/ By _____

PAUL M. SABETTA #52686
138 Orange Street
New Haven, Connecticut 06511
Tel. 562-2322

(Certificate of Service omitted in printing.)

SUPERIOR COURT, G.A. 6
JUDICIAL DISTRICT OF NEW HAVEN

NO. CV6-71539
GLORIA STREATER

v.

WALTER LITTLE

ANSWER—AUGUST 8, 1978

1-2. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraphs 1 and 2 of Plaintiff's Complaint and therefore leaves Plaintiff to her proof.

DEFENDANT
WALTER LITTLE

/s/ By: _____

JON C. BLUE
Legal Assistance to Prisoners
340 Capitol Avenue, Room 101
Hartford, Connecticut 06115
Telephone: 566-2030
His Attorney

(Certificate of Service omitted in printing.)

SUPERIOR COURT, G.A. 6
COUNTY OF NEW HAVEN AT NEW HAVEN

(Title omitted in printing.)

September 28, 1978
BEFORE: Hon. BARRY R. SCHALLER, *Judge.*
APPEARANCES:
For the Plaintiff:
PAUL M. SABETTA, ESQ.
For the Defendant:
JON C. BLUE, ESQ.

EXCERPTS FROM TRIAL TESTIMONY

[2] MR. SABETTA: If your Honor please, I think Attorney Blue has a statement for the record.

MR. BLUE: Yes, I just have a statement for the record, your Honor, concerning the one ground of appeal that might be taken from this case if the plaintiff should prevail. Last November, I believe on November 25, I filed a motion for a blood test and state payment therefore in this case on behalf of Walter Little, the defendant in this case. On December the 5th Judge Melville ruled our motion for a blood test would be granted, but our motion for the test to be paid for by the State of Connecticut was denied. Mr. Little was and still is in the state prison at Enfield and has virtually no income and no assets whatsoever and was simply not able to afford the blood test. So I want a statement for the record in case there should be a subsequent appeal. Even though the motion for a blood test was granted, for financial reasons no blood test has ever been taken.

THE COURT: All right. I am not quite certain what you are doing at this point. You are stating it, but are you renewing a motion to have a blood test?

MR. BLUE: Well, of course, if your Honor were to grant our renewed motion out of the goodness of his [3] heart, we would be very gratified. I assume you won't. The motion has been argued and lost, but I just want it stated for the record in case there should be an appeal and

some appellate judge should later question, because it has been so long, it has been nine months since the motion was denied, that in fact no blood test has ever been taken. I think I would be remiss in my duty to my client if I just didn't get that on the record.

THE COURT: Well, are you asking me to rule on it or not?

MR. BLUE: I am not renewing my motion.

THE COURT: You are not renewing the motion.

MR. BLUE: The motion has been argued and lost, and I assume in light of that, a renewed motion would be an exercise in futility because it has been argued and lost. I wanted the facts clear for the record

THE COURT: All right. On that basis they are noted.

MR. SABETTA: If your Honor please, one other comment I would like to make, with respect to the complaint and the action, there is some minor variances, and fortunately I just recently picked them up. I would ask the Court's indulgence that I may file an [4] amended pleading with respect to the fact that the complaint now states the child is a male child which is incorrect. It is a female child.

In addition, the child was begotten at a date somewhat later in time than the one indicated on August 21 of '74. The testimony will bring that out. Counsel has been apprised of it through the motion for discovery and production which he has filed, and he is aware of the variances in the pleading as on record.

THE COURT: All right.

MR. BLUE: That's correct, your Honor, and I certainly have no objection to an amendment.

THE COURT: You are not filing an amended complaint at this point. You are simply noting there will be some variances?

MR. SABETTA: That's correct.

THE COURT: All right.

MR. SABETTA: I will call Gloria Streater to the stand.

GLORIA STREATER, 198 Hamilton Street, New Haven, Connecticut, was called as a witness in her own behalf, and having been duly sworn, testified as follows:

[5] DIRECT EXAMINATION

BY MR. SABETTA:

Q Mrs. Streater, are you a recipient of state aid?

A Yes.

Q How long have you been on state aid?

A Since around 1970.

Q 1970?

A Uh h'm.

Q Do you have a female child now in your home?

A Yes.

Q What is her name?

A Kenyatta Chantel Streater.

Q What is the date of birth of that child?

A May 21, 1975.

Q Where was she born?

A Yale-New Haven Hospital.

Q Here in New Haven.

A Yes.

Q How long have you lived in New Haven?

A I lived here about twenty years I guess.

Q Now, you have testified that she was born in May of '75. Were you on state aid at that time?

A Yes.

Q And as one of the requirements of your continuing on [6] state aid, were you required to give the name of the father of that child?

A Yes.

Q What name did you give the representative from Social Services Department?

A I gave Walter Little.

Q Is Walter Little in this courtroom today?

A Yes.

Q Could you point him out to his Honor?
(The witness points.)

MR. SABETTA: May the record indicate that she has pointed to the defendant seated next to counsel.

THE COURT: Yes. That's the person you are pointing to.

THE WITNESS: That's him, yes.

THE COURT: The record may so note.

(Whereupon, the witness continued her examination.)
(There follows an excerpt of later testimony in the trial:)

WALTER LITTLE, Box G, Enfield, Connecticut, the defendant, was called as a witness in his own behalf, and having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BLUE:

Q Mr. Little, you are the defendant in this action?

[7] A Yes, I am.

Q When did you first learn of this action?

A Last year.

Q Was it in July or August of 1977?

A August '77.

Q August of 1977. Do you know the plaintiff Gloria Streater?

A Yes, I do.

Q Just for the record, can you point her out in this courtroom?

A She is right there.

MR. BLUE: The record may show that he pointed at the plaintiff Gloria Streater.

THE COURT: All right. So noted.

Q Could you tell the Court what your relationship with Miss Streater was during the years 1973 and 1974 in your own words?

A Yes, sir. We met during my incarceration at Somers Correctional Institution. We began corresponding, visiting, et cetera. And when I had furloughs we saw each other.

Q You have heard Miss Streater's description of your relationship with her, excluding any consideration of other possible friendships she may have had. Was her description of your relationship with her during 1973 and 1974 substantially [8] accurate?

A Yes, it was.

Q In the fall of 1974 how often did you see Miss Streater?

A Well, I was in school at the University of Hartford, and I was only able to get down to New Haven occasionally, and maybe I made it down on the weekends, not every weekend, but possibly every other weekend.

Q This is during the academic year?

A Yes.

Q For the record, when were you released from Somers during 1974?

A Well, actually I was released around April.

Q Of '74?

A Of '74, at which time I entered the Halfway House. I remained at the Halfway House until August of '74.

Q I see.

A And I was seeing her at that time occasionally.

Q Okay. During September of 1974, so far as you can recollect, how often did you see her?

A During—

Q September of 1974, just as best you can remember.

A I didn't see her at all during September.

Q You didn't see her at all during September. Did you see her during October?

[9] A No, I didn't.

Q Did you see her during November?

A Yes, I did.

Q How often did you see her in November?

A I saw her once in November. Once in November.

Q Was that on or about November 1st, 1974 as she has testified?

A On or about. On or about.

Q Did you have sexual relations at that time?

A Yes, I did.

Q Have you had sexual relations with her since that date?

A No, I haven't.

Q And you have testified that you did not see her at all during the months of September and October?

A No. Correct.

Q 1974. So after the summer of 1974 had passed, the one and only time you had sexual relations was during early November of 19—

A Correct.

Q —1974. And you don't deny that—

A No, I don't.

Q —for the record. Then just so the judge can understand your feelings about his matter, why is it you don't [10] admit paternity?

A Pardon me?

Q Why is it that you haven't admitted you are the father of this child?

A Well, I have called Miss Streater on numerous occasions prior to this present incarceration, you know, and I have asked her on numerous different occasions if I can come to New Haven and in fact see this child, and she told me no on each occasion. So after I got the paternity suit, I was at that time incarcerated. I asked her if she would bring the baby up so that I could see the child. No response. I received no response from her since then.

Q Is there any doubt in your mind that you are the father?

A There is a lot of room for uncertainty here because I mean, if the child is mine, of course I want to support her. I want to take care of it, but there is too much doubt in my mind at this point and time.

Q Why do you have that doubt just so that the Court could know?

A Well, because of her relationship with Mr. Fern, because of the fact that I have never seen the child and I don't think any man in his right mind would sign the papers for a child he has never seen. So this is my reason for not signing the paper that they want me to sign.

[11] Q Mr. Little, for the record, and you have testified that you learned of this suit in August of 1977 approximately. Where were you at that time?

A I was incarcerated.

Q At which institution?

A The Enfield Correctional Institution.

Q Have you been incarcerated since the summer of '77? Have you been incarcerated in Somers?

A No, I have not.

Q So since the summer of '77 have you been incarcerated in an institution where Mr. Fern and Mr. Shelton were?

A No, I have not.

Q So you have never talked to them about this case at all, and have you ever had an opportunity to talk to them about this case?

A No, I have not.

Q Because do you for the record—I don't know if the Court—how familiar the Court is with the prison arrangements in Connecticut. Are Somers and Enfield entirely distinct institutions?

A They are separate and distinct, right.

Q When a person is incarcerated in Enfield, he has no occasion typically to go to Somers or meet anyone who is incarcerated in Somers?

[12] A On occasion he is apt to go down there for medical reasons, you know, school reasons, educational reasons or whatever, but at that time he is usually kept separate from the mainstream population.

Q I see. So how do you know Mr. Fern and Mr. Shelton?

A I met them when I first went to prison in '77.

Q Did you know them in New Haven at all?

A No, I didn't. I never met them until I went to prison.

MR. BLUE: I have no further questions.

(Reporter's certificate omitted in printing.)

SUPERIOR COURT—CIVIL DIVISION GA
JUDICIAL DISTRICT OF NEW HAVEN
STATE OF CONNECTICUT

NO. CV6-71539

GLORIA STREATER

v.

WALTER LITTLE
Present Hon. Freedman, Judge

JUDGMENT—OCTOBER 16, 1978

This paternity action by duly verified writ, summons and complaint dated July 11, 1977, came to this Court on September 28, 1978 when the defendant appeared and the parties were heard as on file and thence to October 16, 1978 when a hearing in damages was conducted by this Court.

The Court, having heard the evidence as on file, finds the issue of paternity in favor of the plaintiff.

Whereupon, it is adjudged that the defendant, Walter Little is the father of the plaintiff's minor child: KENYATTA CHANTEL, born May 21, 1975 and that said defendant is liable for the following sums as reasonable maintenance and support and for costs and attorney's fees as allowed by statute:

Lying-in expenses of the plaintiff and said minor child:	$	852.02
Accrued Maintenance from 5/21/76 to 10/31/78:	$	5,790.26
Costs of suit plus reasonable attorney's fees:	$	332.20
TOTAL	$	6,974.48

It is further adjudged and ordered that the defendant pay child support at the rate of $2.00 per/month, said weekly/monthly amount to be allocated as follows: $1.00 per/month toward said arrearage amount of $6,974.48 and $1.00 per/month toward the current monthly award of $163.58.

Said weekly/monthly payments shall be made to the Department of Finance & Control, State of Connecticut, 76 Meadow Street, East Hartford, Connecticut 06108, commencing November 1, 1978.

BY THE COURT

/s/ _____

FREEDMAN
Judge

SUPERIOR COURT APPELLATE SESSION
NEW HAVEN JUDICIAL DISTRICT

NO. CV6-71539

GLORIA STREATER

v.

WALTER LITTLE

FINDING—JANUARY 31, 1979

QUESTIONS TO BE REVIEWED

1. Did the court err in denying Appellant's Motion that the cost of blood grouping tests be paid by the State of Connecticut?

FACTS PROVEN

2. The Appellee, Gloria Streater, instituted this action on July 11, 1977, seeking a judgment that the Appellant, Walter Little, is the father of a female child, Kenyatta Chantel Streater, to whom Appellee gave birth on May 21, 1975.

3. Appellant conceded that in Connecticut a paternity action such as brought by the Appellee is a civil action.

4. Appellant was at the time of this motion incarcerated in the Connecticut Correctional Institution, Enfield.

5. The Appellant's financial affidavit which was on file at the time of this motion indicated he had no assets.

6. The Appellant's financial affidavit indicated weekly income and expenses of five ($5.00) dollars.

CONCLUSIONS REACHED

7. A paternity action in the State of Connecticut is a civil action.

8. At the time of Appellant's motion he was indigent and could not afford to pay the costs for blood grouping tests.

9. There was no evidence offered of any degree of correlation between the number of putative fathers submitting themselves for blood grouping tests and the number scientifically excluded by such tests.

10. Appellant's motion for blood grouping tests was granted.

11. Appellant's request that the State of Connecticut pay the costs of such blood grouping tests was denied.

CLAIMS OF LAW MADE AND RULINGS OF THE COURT THEREON

12. Because of his indigency, Appellant was entitled by the Fourteenth Amendment to the Constitution of the United States to an order that the costs of a blood grouping test be paid by the State of Connecticut.

13. Request for costs denied. The denial to an indigent person of the costs of procuring a blood grouping test in a civil paternity action in the absence of a showing of a strong correlation between the number of putative fathers submitting themselves for testing and the number scientifically excluded by such tests does not constitute a denial of due process within the meaning of the Fourteenth Amendment to the Constitution of the United States.

BY THE COURT:

/s/ _____

MELVILLE, J.

APPELLATE SESSION OF THE SUPERIOR COURT
NEW HAVEN JUDICIAL DISTRICT

NO. 806

GLORIA STREATER

v.

WALTER LITTLE

CORRECTION OF FINDING—MARCH 13, 1979

The following corrections of the Finding are made:

A. by adding to the section entitled "Facts Proven" this paragraph:

6a. There was no evidence offered of any degree of correlation between the number of putative fathers submitting themselves for blood grouping tests and the number scientifically excluded by such test.

B. by deleting from the section entitled "Conclusions Reached" paragraph nine thereof.

Except for the foregoing corrections, further corrections of the finding are refused.

BY THE COURT:

/s/ _____
MELVILLE, J.

APPELLATE SESSION OF THE SUPERIOR COURT

December, 1979, at Hartford

A.S. 806

GLORIA STREATER

v.

WALTER LITTLE

Argued: December 19, 1977

Decided: February 29, 1980

Paternity action brought to the Court of Common Pleas in New Haven County where the court, *Melville, J.*, granted the defendant's motion for a blood grouping test but ordered the cost of such test not to be paid by the state; the court, *Schaller, J.*, adjudged the defendant to be the father of the plaintiff's minor child and the defendant appeals. *No error.*

Jon C. Blue, for the appellant (defendant).

Stephen J. McGovern, assistant attorney general, for the appellee (state).

PER CURIAM. This case presents for the third time before this court the question of whether in a paternity proceeding General Statutes § 46b-168, which makes the costs of blood grouping tests chargeable against the party moving for such tests, violates the due process and equal protection rights of an indigent defendant in such a proceeding. In *Ferro* v. *Morgan*, 35 Conn. Sup. 689, *cert. denied*, 177 Conn. 753, 399 A.2d 526 (1979), we addressed and specifically rejected these constitutional claims. In *Knox* v. *Siddell*, Conn. Sup. (App. Sess. No. 734, Decided March 16, 1979), we again considered these claims and as an alternative ground ruled that our decision was controlled by *Ferro* v. *Morgan*, supra. No new arguments or authorities have been presented to us in this case which would persuade us to come to a different result.

There is no error.

PARSKEY, D. SHEA and BIELUCH, Js., participated in this decision.

Date of Judgment—February 29, 1980
Counsel Notified—February 29, 1980
Alfred J. Gaicfolo
Assistant Clerk
Appellate

Supreme Court of the United States

No. 79-6779

WALTER LITTLE, APPELLANT,

v.

GLORIA STREATER

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis*, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted.

APPEAL from the Appellate Session of the Superior Court of Connecticut.

The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted.

October 6, 1980

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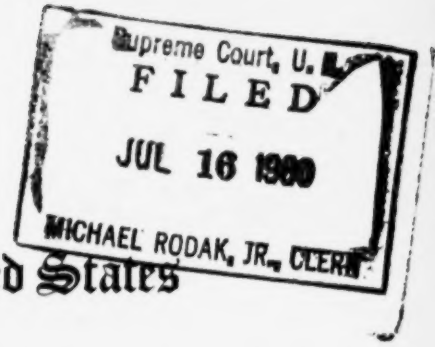

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-6779

WALTER LITTLE

Appellant

v.

GLORIA STREATER

Appellee

ON APPEAL FROM THE APPELLATE SESSION OF THE SUPERIOR COURT OF CONNECTICUT

MOTION TO DISMISS OR AFFIRM

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July 15, 1980

INDEX

	Page
OPINION BELOW	2
JURISDICTION	2
THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE	2
QUESTION PRESENTED	3
STATEMENT	3
ARGUMENT	4
CONCLUSION	10

TABLE OF AUTHORITIES

Cases *Page*

Boddie v. Connecticut, 401 U.S. 371, 28 L.Ed. 2d 113, 91 S. Ct. 780 (1971) 5, 6

City of Hartford v. Public Utilities Commission, 30 Conn. Supp. 244, 309 A.2d 844 (1973) 4

Ferro v. Morgan, 35 Conn. Supp. 629, 406 A.2d 873, cert. denied, 177 Conn. 753, 399 A.2d 526 (1979) 4, 7, 9

Franklin v. Colorado, 4 Family Law Reports, 2037 . 5

Griffin v. Illinois, 351 U.S. 12, 76 S. Ct. 585 100 L.Ed. 891 (1956) 5

Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1977) 9

Robertson v. Apuzzo, 170 Conn. 367 (1976) 5, 7, 8, 9

STATUTES

Connecticut General Statutes § 46b-168 ..... 2, 4

U.S. Constitution amend XIV § 1 ..... 3, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-6779

WALTER LITTLE

Appellant

v.

GLORIA STREATER

Appellee

ON APPEAL FROM THE APPELLATE SESSION OF THE SUPERIOR COURT OF CONNECTICUT

MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Appellate Session of the Superior Court of Connecticut on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

OPINION BELOW

The opinion of the Supreme Court of Connecticut and the Appellate Session of the Superior Court of Connecticut are as set forth in Appellant's Jurisdictional Statement at Page 1.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Appellant's Jurisdictional Statement on Page 2.

I

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute

This appeal raises the question of the validity of Connecticut General Statute Section 46b-168 (1979). That statute states:

> "In any proceeding in which a question of paternity is in issue, the Court, on motion of any party, may order the mother, her child and the putative father or the husband of the mother to submit to one or more blood grouping tests to be made by a qualified physician or other qualified person, designated by the court, to determine whether or not the putative father or the husband of the mother can be excluded as being the father of the child. The results of such tests will be admissable in evidence only in cases where such results establish definite exclusion of the putative father or such husband as such father. The costs of making such tests shall be chargeable against the party making the motion."

This case also involves the following Constitutional provision of Section One of the Fourteenth Amendment to the Constitution of the United States which states:

> "[N]or shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTION PRESENTED

1. Whether the costs of a blood grouping test ordered on the motion of an indigent defendant in a paternity action must be paid by the State of Connecticut lacking any statutory authority for such payment.

STATEMENT

The Appellant in this action was named by the Appellee, Gloria Streater, to be the father of her minor child in a paternity action instituted on July 11, 1977.

The Appellant later moved that the Appellee, her minor child and himself be ordered to submit to blood grouping tests with the request that the costs of such tests be paid by the Appellee, State of Connecticut.

The Appellant's motion for blood grouping tests was granted by the trial court. However, his request that the costs of such tests be borne by the State of Connecticut was denied.

On October 4, 1978, after hearing the Appellant was found to be the father of the minor child of the Appellee, Gloria Streater.

The Appellant appealed the denial of his request that the State of Connecticut pay for blood grouping tests to the Appellate Session of the Superior Court of Connecticut.

The Appellate Session affirmed the order of the trial court.

The Appellant filed a petition for certification to the Supreme Court of the State of Connecticut.

The Supreme Court of the State of Connecticut denied Appellant's petition for certification.

ARGUMENT

The decision of the Appellate Session of the Superior Court of Connecticut is clearly correct.

Section 52-184 of the Connecticut General Statutes makes it very clear who the legislature of the State of Connecticut intended to bear the cost of blood grouping tests in paternity actions. The final sentence of Section 52-184 states:

> "The costs of making such tests shall be chargeable against the party making the motion."

There is no authority under Connecticut law for a court to order the State to assume the costs of blood grouping tests for defendants in paternity actions. This principle was clearly established in the case of *Ferro v. Morgan*, A.S. 686, 35 Conn. Supp. 679 (1979). This decision in the *Ferro* case reversed the order of a trial judge who had ordered the State of Connecticut to pay the costs of blood grouping tests in a situation identical to the present case. The general rule in Connecticut is that every litigant must bear his own expenses of litigation except as otherwise provided by statute. *City of Hartford v. Public Utilities Commission*, 30 Conn. Supp. 244, 309, A.2d. 844 at 848 (1973).

The fact that some other states bear the costs of blood grouping tests is not a basis upon which to require the State of Connecticut to do likewise. Because a number of states bear the costs of providing a defendant with an evidentiary tool does not elevate the access to such a tool to the status of a fundamental right.

The Supreme Court, in the case of *Robertson v. Apuzzo*, 170, Conn. 367 (1976), laid to rest the contention that a paternity action in Connecticut is a quasi-criminal proceeding and held that such an action is clearly a civil one. Therefore, the Court held that an indigent defendant in a paternity action is not denied constitutional due process when he is denied a jury trial because of his inability to pay the statutory fee, 170 Conn. 367, 380.

In reaching its conclusion in *Robertson v. Apuzzo*, the Court approached the problem "with a clear understanding that the requirements of due process are not fixed but depend on the nature of the case under consideration and the relative interests, both governmental and private, involved." 170 Conn. 367, 372.

The due process and equal protection clause of the United States Constitution operate to require that greater protection be afforded defendants in criminal and quasi-criminal proceedings than in civil actions. *Franklin v. Colorado*, 4 Family Law Reporter 2037; *Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L.Ed. 891 (1956). In *Robertson v. Apuzzo*, the Court held that a paternity action in Connecticut is a civil one. Therefore, the requirement that the moving party on a motion for blood grouping tests be required to bear their costs must be analyzed in light of the due process requirements applicable to civil actions.

The Supreme Court in *Boddie v. Connecticut*, 401 U.S. 371, 28 L.Ed. 2d 113, 91 S. Ct. 780 (1971), set forth the requirements of due process which have taken shape over the space of more than one hundred years of judicial interpretation. The

Court stated:

> What the Constitution does require is "an opportunity . . . granted at a meaningful time and in a meaningful manner," Armstrong v. Manzo, 380 U.S. 545, 552; 14 L.Ed. 2d. 62, 85 S. Ct. 1187 (1965) (emphasis added), "for [a] hearing appropriate to the nature of the case." Mullane v. Central Hanover Trust Co., supra, at 313, 94 L.Ed. at 873. The formality and procedural requisition for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceeding. 28 L.Ed. 2d at 118.

The defendant argues that the deprivation of the opportunity to present evidence of blood grouping tests because of his lack of funds to procure them would deprive him of the meaningful opportunity to be heard mandated by *Boddie*. However, the Court in *Boddie* refused to mandate any particular form of hearing, stating, as cited above, that the "formality and procedural requisites can vary, depending upon the importance of the interests involved and the nature of the subsequent proceeding." *Boddie v. Connecticut*, supra 28 L.Ed. at 118.

The State does not dispute that a defendant has a strong interest in providing the best valid defense he can in any civil action. However, the defendant-appellant here would have us believe that without the availability of blood grouping tests he is thereby deprived of the opportunity to defend the paternity action.

The Court in *Boddie* pointed out that a "State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the premise of the Due Process Clause" but "within the limits of practicability." *Boddie v. Connecticut*, supra, 28 L.Ed. 2d at 119-120. If the Court had granted the defendant's Motion for a Blood Test In Forma Pauperis, the State would be subsidizing the defendant's defense.

In *Ferro*, supra, the Appellate Session of the Superior Court of Connecticut met the denial of due process argument in the following fashion:

> "The requirements of due process are not fixed but depend upon the nature of the case under consideration and the relative interests, both governmental and private which are involved." *Robertson v. Apuzzo*, 170 Conn. 361, 372. It is important to point out that in Connecticut paternity actions are civil and not criminal proceedings and the general rules governing civil actions apply. Ibid. The defendant is in Court; he can invoke the rules of pretrial discovery, and he can present evidence material to his defense. The defendant in a paternity action has a meaningful opportunity to be heard at a meaningful time, and due process is not violated."

In *Robertson v. Apuzzo*, 170 Conn. 367, 365 A.2d 824 (1976), the Connecticut Supreme Court analyzed the equal protection argument in relationship to the payment of a fee to obtain a Jury Trial in a paternity action. In holding that such a fee does not deny a defendant constitutional equal protection of the laws the Court stated:

> The problem is primarily one of economic equality rather than one of political equality or equality of opportunity. See Wilkinson, "The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality," 61 Va. L. Rev. 945. A free Jury Trial in the context of paternity proceedings to maintain a child bears little resemblance "to free speech or marriage or to those other rights, so many of which are inbedded in the First Amendment, that the Court has come to regard as fundamental . . . ." *United States v. Kras*, supra, 446; see *Dunn v.*

Blumstein, 405 U.S. 330, 92 S. Ct. 995, 31 L.Ed. 2d 294 (the right to vote); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 94 S. Ct. 1076, 39 L.Ed. 2d 306 (right of an indigent to medical care); *Shapiro v. Thompson*, 394 U.S. 618, 89 S. Ct. 1322, 22 L.Ed. 2d. 600 (right to interstate travel); *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814; 9 L.Ed. 2d 811 (the right to vote); *Kusper v. Pontikes*, 414 U.S. 51, 94 S. Ct. 303, 38 L. Ed. 2d 260 (freedom of association). Nor does it involve a statutory classification based on race (*Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d. 1010); alienage or national origin (*Graham v. Richardson*, 403 U.S. 365, 91 S. Ct. 1848, 29 L.Ed. 2d 534). Paternity legislation, designed to provide for the support and maintenance of the child, is in the area of economics and social welfare. See *Kuser v. Orkis*, 169 Conn. 66, 71, 362 A. 2d 943; see *Ortwein v. Schwab*, 410 U.S. 656, 93 S. Ct. 1172, 35 L. Ed. 2d 572, rehearing denied, 411 U.S. 922, 93 S. Ct. 1551, 36 L. Ed. 2d 315; *United States v. Kras*, supra; *Danbridge v. Williams*, 397 U.S. 471, 484-85, 90 S. Ct. 1153, 25 L. Ed. 2d 491. Hence, "the applicable standard, in measuring the propriety of . . . [the legislature's] classification, is that of rational justification." *United States v. Kras*, supra. It is readily apparent that the purpose of the fee is to offset some of the costs of a Jury Trial and the fee is required of every civil litigant who asks for such a trial. We conclude that the jury fee serves a legitimate State interest in a paternity action and satisfies the equal protection clause of the fourteenth amendment to the federal constitution and article first Section 20, of the Constitution of Connecticut. 170 Conn. at 382, 383.

The Court's analysis in *Robertson v. Apuzzo* is applicable as well to this case. A paternity action is in the realm of

economic and social welfare and therefore the rational basis test must be applied to the legislative classification. The burden therefore rests on the defendant "to show that the legislation in question does not have a rational basis." *Horton v. Meskill*, 172 Conn. 615, 640, 376 A.2d. 359 (1977).

In deciding *Ferro*, supra, this Court viewed the equal protection issue in this manner at 11:

> "The legislature, in the exercise of its powers, enacted General Statutes Section 52-184. It has general application. It provides in part that "[t]he costs of making such [blood grouping] tests shall be chargeable against the party making the motion." The purpose was to provide that any party where a question of paternity is an issue, who wants such tests may obtain a court order to that effect, but that party, and no one else, was to bear its expense. This statutory placing of such an expense on the party who moves for the tests provides that the cost of litigation be on the one who desires that evidence. There is no denial of equal protection under either the United States or Connecticut Constitutions."

Therefore, under the holdings of *Robertson v. Apuzzo*, supra, *Ferro*, supra, and the present case, the requirement that the moving party bear the costs of blood grouping tests satisfies the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution and article first, Section 20, of the Constitution of Connecticut.

CONCLUSION

For reasons above stated, the respondent requests that the judgment of the Appellate Session of the Superior Court of Connecticut be affirmed or in the alternative that the petitioner's appeal be dismissed.

Respectfully submitted,

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CERTIFICATION OF SERVICE

This is to certify that on the 15th day of July, 1980, a copy of the foregoing Motion to Dismiss Or Affirm was deposited in a United States Post Office or mailbox with first class postage prepaid, addressed to counsel of record to wit:

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No. 79-6779

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WALTER LITTLE,

Appellant,

v.

GLORIA STREATER,

Appellee.

ON APPEAL FROM THE APPELLATE SESSION
OF THE SUPERIOR COURT OF CONNECTICUT

BRIEF FOR APPELLANT

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QUESTION PRESENTED

In a paternity proceeding that the State of Connecticut caused to be instituted by a recipient of public assistance against an indigent, incarcerated defendant, does Conn.Gen.Stat. §46b-168 (1979) violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States when applied to deny the use of blood grouping tests to the defendant solely because of his indigency?

PARTIES TO THE PROCEEDINGS

(1) *Walter Little,* the appellant, was the defendant in the proceedings below.

(2) *Gloria Streater,* the appellee, was the plaintiff in the proceedings below.

(3) *Carl R. Ajello,* the Attorney General of Connecticut, is a party to this proceeding pursuant to Conn.Gen.Stat. §46b-160 (1979).

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
PARTIES TO THE PROCEEDING i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
OPINIONS BELOW 1
JURISDICTION 2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2
STATEMENT OF THE CASE 3
HOW THE CONSTITUTIONAL QUESTION WAS RAISED AND DECIDED BELOW 6
SUMMARY OF ARGUMENT 7
ARGUMENT 8
I. THE DENIAL OF BLOOD GROUPING TESTS TO A DEFENDANT IN A PATERNITY PROCEEDING SOLELY BECAUSE OF HIS INDIGENCY VIOLATES THE DUE PROCESS CLAUSE 8
A. The unique importance of blood grouping tests in paternity litigation 9
B. The requirements of the Due Process Clause 16
II. THE DENIAL OF BLOOD GROUPING TESTS TO A DEFENDANT IN A PATERNTY PROCEEDING SOLELY BECAUSE OF HIS INDIGENCY DENIES HIM THE EQUAL PROTECTION OF THE LAWS 39
CONCLUSION 44

TABLE OF AUTHORITIES

Cases *Page*

Alderman v. United States,
394 U.S. 165 (1969) 21

B. v. Superior Court,
86 Cal. App. 3d 1006, 150 Cal.Rptr. 586 (1978) 16

Baldwin v. Hale,
68 U.S. (1 Wall.) 223 (1864) 19

Beuschel v. Manowitz,
151 Misc. 899, 271 N.Y.S. 277, *rev'd per curiam,*
241 App. Div. 888, 272 N.Y.S. 165, *motion for leave to appeal denied,* 265 N.Y. 509, 193 N.E. 295 (1934) 11

Bigsby v. Bates,
59 Ohio Misc. 51, 391 N.E.2d 1384 (C.P. 1978) 17,18

Boddie v. Connecticut,
401 U.S. 371 (1971) 19,20,25,39

Booth v. Hart,
43 Conn. 480 (1876) 34

Boswell's Lessee v. Otis,
50 U.S. (9 How.) 336 (1850) 19

Bounds v. Smith,
430 U.S. 817 (1977) 30

Brady v. Maryland,
373 U.S. 83 (1963) 32

Breithaupt v. Abram,
352 U.S. 432 (1957) 22

Britt v. North Carolina,
404 U.S. 226 (1971) 31

Burton v. Wilmington Parking Authority
365 U.S. 715 (1961) 28,36

Caban v. Mohammed,
441 U.S. 380 (1979) 13,38

Civil Rights Cases,
109 U.S. 3 (1883) 28

Cochran v. Kansas,
316 U.S. 255 (1942) 29

Commissioners of Almshouse v. Whistelo,
3 Wheeler's Crim. Cas. 194 (N.Y.Gen.Sess. 1808) 10

Commonwealth v. Possehl,
355 Mass. 575, 246 N.E. 2d 667 (1969) 17,18

Commonwealth v. Zammarelli,
17 Pa.D. & C. 229 (1931) 10

Cortese v. Cortese,
10 N.J. Super. 152, 76 A.2d 717 (1950) 12,13,22

Cramer v. Morrison,
88 Cal. App. 3d 873 153 Cal. Rptr. 865 (1979) 12

Doe v. Maher,
414 F.Supp. 1368 (D.Conn. 1976), *vacated,*
432 U.S. 526 (1977) 28

Domonkos ex rel. Herman v. Rotundo,
4 Conn. Supp. 29 (C.P. 1936) 11

Douglas v. California,
372 U.S. 353 (1963) 31

Estelle v. Gamble,
429 U.S. 97 (1976) 30

Evans v. Newton,
382 U.S. 296 (1966) 28

Ferro v. Morgan,
35 Conn. Supp. 679, 406 A.2d 873, *cert. denied,*
177 Conn. 753, 399 A.2d 526 (1979) 6,7,12

Ford v. Ford,
191 Neb. 548, 216 N.W. 2d 176 (1974) 18,38

Ford v. Ford,
Doc. 655, No. 275 (Dist. Ct. Douglas Cty. Neb.
Feb. 21, 1975) 18

Franklin v. District Court,
194 Colo. 189, 571 P.2d 1072 (1977) 17,18,27

G. v. R.,
95 Misc. 2d 273, 407 N.Y.S.2d 414 (Fam. Ct. 1978) ... 18

Gardner v. California,
393 U.S. 367 (1969) 31

Gomez v. Perez,
409 U.S. 535 (1973) 13,37

Green v. United States,
355 U.S. 184 (1957) 32

Griffin v. Illinois,
351 U.S. 12 (1956) ..... *passim*

Harper v. Virginia Board of Elections,
383 U.S. 663 (1966) 40

Hepfel v. Bashaw,
279 N.W. 2d 342 (Minn. 1979) 12

Hovey v. Elliott,
167 U.S. 409 (1897) 19

Ex parte Hull,
312 U.S. 546 (1941) 29

Johnson v. Avery,
393 U.S. 483 (1969) 30

Kelsaw v. Green,
6 Conn. Cir. Ct. 516, 276 A.2d 909
(App. Div. Cir. Ct. 1971) 35

Klapprott v. United States,
335 U.S. 601 (1949) 29

Kovacs v. Cooper,
336 U.S. 77 (1949) 43

Lalli v. Lalli,
439 U.S. 259 (1978) 13

Lane v. Brown,
372 U.S. 477 (1963) 31

Lascaris v. Lardeo,
100 Misc. 2d 220, 417 N.Y.S. 2d 665 (1979) 12,18
Long v. District Court,
385 U.S. 192 (1966) 31
Lurry v. Mills,
152 N.J. Super. 127, 377 A.2d 804 (1977) 18
M. ex rel. T. v. S.,
169 N.J. Super. 209, 404 A.2d 653 (1979) 18
Maher v. Doe,
432 U.S. 526 (1977) 28
Mayer v. City of Chicago,
404 U.S. 189 (1971) 32
Meyer v. Nebraska,
262 U.S. 390 (1923) 35
Michigan v. Tucker,
417 U.S. 433 (1974) 21
Mosher v. Bennett,
108 Conn. 671, 144 A. 297 (1929) 34
Mullane v. Central Hanover Bank & Trust Co.
339 U.S. 306 (1950) 19
Nations v. Johnson,
65 U.S. (24 How.) 195 (1861) 19
Ortwein v. Schwab,
410 U.S. 656 (1973) 25,42,43
Parham v. Hughes,
441 U.S. 347 (1979) 13
People ex rel. Van Epps v. Doherty,
261 App. Div. 86, 24 N.Y.S. 2d 821 (1941) 16
Pierce v. Society of Sisters,
268 U.S. 510 (1925) 35
Rakas v. Illinois,
439 U.S. 128 (1978) 21
Reynolds v. Kimmons,
569 P.2d 779 (Alas. 1977) 18

Roberts v. LaVallee,
389 U.S. 40 (1967) 31

Robertson v. Apuzzo,
170 Conn. 367, 365 A.2d 824, *cert. denied,* 429 U.S. 852 (1976) 5,26

Roe v. Norton,
422 U.S. 391 (1975) 28

Ross v. Moffitt,
417 U.S. 600 (1974) 25

San Antonio Independent School District v. Rodriguez,
411 U.S. 1 (1973) 41

Schmerber v. California,
384 U.S. 757 (1966) 22

Shelley v. Kraemer,
334 U.S. 1 (1948) 27

Smith v. Bennett,
365 U.S. 708 (1961) 26,31

Smith v. Walker,
138 N.J. Super. 187, 350 A.2d 319 (1975) 17,18

Snyder v. Massachusetts,
291 U.S. 97 (1934) 33

Stanley v. Illinois,
405 U.S. 645 (1972) 13,36,38,43

State v. Damm,
64 S.D. 309, 266 N.W. 667 (1936) 11,22

State v. Fowler,
277 N.C. 305, 177 S.E.2d 385 (1970) 12

State v. Sebastian,
81 Conn. 1, 69 A. 1054 (1908) 11,34

State ex rel. Graves v. Daugherty,
266 S.E.2d 142 (W.Va. 1980) 17,18,27

State ex rel. Ortloff v. Hanson,
277 N.W.2d 205 (Minn. 1979) 12

Stone v. Powell,
428 U.S. 465 (1976) .....
Streater v. Little, 21,22
No. 806 (App.Sess.Conn. Super. Ct. Feb. 29, 1980),
cert. denied, 180 Conn. 756, 414 A.2d 199 (1980) 1
Town of Chaplin v. Hartshorne,
6 Conn. 41 (1825) 34
Trimble v. Gordon,
430 U.S. 762 (1977) 13
Trustees of Dartmouth College v. Woodward,
17 U.S. (4 Wheat.) 518 (1819).....19
Union Pacific Railway v. Botsford,
141 U.S. 250 (1891) 21,22
United States v. Ash,
413 U.S. 300 (1973) 33
United States v. Ceccolini,
435 U.S. 268 (1978) 21
United States v. Kras,
409 U.S. 434 (1973) 25,29,42
United States v. Payner,
100 S.Ct. 2439 (1980) 21
Walker v. Stokes,
45 Ohio App. 2d 275, 344 N.E.2d 159 (1975) 17
Walker v. Stokes,
54 Ohio App. 2d 119, 375 N.E. 2d 1258 (1977) 18,27
Wardius v. Oregon,
412 U.S. 470 (1973) 33
Williams v. Illinois,
399 U.S. 235 (1970) 39
Windsor v. McVeigh,
93 U.S. 274 (1876) 19
In re Winship,
397 U.S. 358 (1970) 22

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV 16
U.S. Const. amend. XIV, § ..... *passim*

STATUTES

Ala. Code tit. 26 §12-5 (1977) 16
Ark. Stat. Ann. §34-705.1 (1962) 16
Cal. Evid. Code §894 (Deering 1966) 16
Conn.Gen.Stat. §17-1b (1979) 3
Conn.Gen.Stat. §46b-160 (1979) i
Conn.Gen.Stat. §46b-168 (1979) i,2,3,6,7,40,44
Conn.Gen.Stat. §46b-169 (1979) 3,
Conn.Gen.Stat. §46b-215 (1979) 5,26
Conn.Gen.Stat. §52-258 (1979) 5
Conn.Gen.Stat. §53-304 (1979) 18,26
1848 Conn.Pub.Acts ch.44 34,35
1971 Conn.Pub.Acts No. 439 28
Ga. Code §74-311 (Supp. 1980) 17
Haw.Rev.Stat. §584-16 (1976) 16
Idaho Code §7-1117 (1979) 16
Ill.Rev.Stat. ch.106 3/4 §3 (Supp. 1980-81) 16
Kan.Stat. §23-132 (1974) 16,23
La.Rev.Stat.Ann. §9:397.1 (West.Supp. 1980) 16
Me./Rev.Stat. tit. 19 §279 (Supp. 1980-81) 17
Md. Ann. Code art. 16 §66G (Supp. 1980) 16
Mich. Stat. Ann. §25.496 (1974) 16
1980 Minn.Sess.Law.Serv. ch.589 §19 (West)
(to be codified as Minn.Stat. §257.69) 16
Miss.Code Ann. §93-9-25 (1972) 17
Nev.Rev.Stat. §56.020 (1979) 17
N.H.Rev.Stat.Ann. §522.3 (1974) 16

N.Y.Fam.Ct.Act §532 (McKinney Supp. 1976-79) 16
1935 N.Y. Laws chs. 196-98 11
N.C.Gen.Stat. §8-50.1 (Supp. 1979).....16
N.D. Cent. Code §14-17-15 (Supp. 1977).....16
Ohio Rev. Code Ann. §3111.16 (Baldwin 1976).....17
Or. Rev. Stat. §109.256 (1979) 16
42 Pa. Cons. Stat. Ann. §6132 (Purdon Supp. 1980).....16
R.I. Gen. Laws §15-8-13 (Supp. 1980).....17
88 Stat. 2337 (1974) 28
Tenn.Code Ann. §24-716 (Supp. 1979) 17
Tex.Fam.Code Ann. §13.03 (Vernon Supp. 1980).....16
28 U.S.C. §1257 (1976)..... 2
42 U.S.C. §654 (1976).....28,37
Utah Code Ann. §78-25-23 (1977) 16
Va. Code §20-61.2 (Supp. 1980) 17
Wash.Rev.Code Ann. §26.26.140 (Supp. 1980-81) 17
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The Book of the General Laws for the People Within the Jurisdiction of Connecticut (1673) 33
45 C.F.R. §232.12 (1979).....28
120 Cong.Rec. 40321 (1974).....37
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-6779

WALTER LITTLE,

Appellant,

v.

GLORIA STREATER,

Appellee.

ON APPEAL FROM THE APPELLATE SESSION
OF THE SUPERIOR COURT OF CONNECTICUT

BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the Appellate Session of the Superior Court of Connecticut (J.A. 25) is unreported. The order of the Supreme Court of Connecticut denying certification is reported at 180 Conn. 756, 414 A.2d 199 (1980). No opinions were filed by the Superior Court of Connecticut at the trial level.

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. § 1257 (2) (1976), the validity of Conn.Gen.Stat. § 46b-168 (1979) having been drawn into question on the ground of its being repugnant to the Constitution of the United States as applied in this case and the decision of the Appellate Session of the Superior Court of Connecticut being in favor of its validity.

The judgment of the Appellate Session of the Superior Court of Connecticut was entered on April 1, 1980. A Notice of Appeal to this Court, a copy of which appears at p.4a of the Appendix to the Jurisdictional Statement, was duly filed in the Appellate Session of the Superior Court on June 3, 1980. The case was docketed in this Court and a Jurisdictional Statement filed on June 16, 1980. This Court noted probable jurisdiction on October 6, 1980. (J.A. 27.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process and Equal Protection Clauses of Section 1 of the Fourteenth Amendment to the Constitution of the United States. That section provides, in relevant part, that:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves Conn.Gen.Stat. § 46b-168 (1979). That statute provides that:

> In any proceeding in which a question of paternity is an issue, the court, on motion of any party, may order the

mother, her child and the putative father or the husband of the mother to submit to one or more blood grouping tests, to be made by a qualified physician or other qualified person, designated by the court, to determine whether or not the putative father or the husband of the mother can be excluded as being the father of the child. The results of such tests shall be admissible in evidence only in cases where such results establish definite exclusion of the putative father or such husband as such father. The costs of making such tests shall be chargeable against the party making the motion.

STATEMENT OF THE CASE

On May 21, 1975, Gloria Streater, the appellee, gave birth to a female child, Kenyatta Chantel Streater. The sole factual issue in this case is whether Walter Little, the appellant, is Kenyatta's biological father.

Appellee was, at the time of Kenyatta's birth, a recipient of public assistance. As a requirement of continuing eligibility for such assistance, she was compelled by Conn.Gen. Stat. §46b-169 (1979) to disclose the name of Kenyatta's putative father to the Connecticut Department of Social Services.[1] The name she gave to a Department representative was Walter Little. (J.A. 14.)[2] The Department of Social Services then retained an attorney to bring a paternity action against appellant. (J.A. 10.)[3]

---

[1]The Connecticut Department of Social Services has since been renamed the Department of Income Maintenance. Conn.Gen.Stat. §17-1b (1979).

[2]Kenyatta Streater's Birth Certificate omits all information concerning the identity of her father. (R. 30.)

[3]The State of Connecticut expended $332.20 in court costs and attorney's fees in suing appellant, an amount later taxed to appellant as costs. (J.A. 20.)

On July 11, 1977, appellee signed a petition seeking a judgment that Walter Little was the father of her child. (J.A. 3.) The action was filed in what was then termed the Court of Common Pleas, Geographical Area No. 6, in New Haven, Connecticut.[4] Walter Little was, at the time, incarcerated in the Connecticut Correctional Institution, Enfield. (J.A. 18.)

As discussed at pp. 10-11, *infra,* modern medical technology has developed standard blood grouping tests that scientifically and conclusively exonerate more than 90% of all falsely accused defendants in paternity proceedings. These tests were readily available in Connecticut at the time this action was instituted at a cost of $250.[5] Appellant, however, was completely without assets and had no income other than a nominal prison stipend. (J.A. 7.) His incarceration, of course, precluded any chance that he would be able to earn the laboratory fee. He was, in a word, indigent.[6] He consequently filed a Motion For Blood Grouping Test In Forma Pauperis on November 28, 1977. The Motion recited the facts of his indigency and requested a court order requiring appellee and her child to submit to a blood grouping test and a further order that the cost of such test be paid by the State of Connecticut. (J.A. 5.) On December 5, 1977, however, this Motion was denied by the court to the extent that it requested that the cost of such tests be paid by the State. (J.A. 8.)

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[4]The Court of Common Pleas was merged with the Superior Court of Connecticut on July 1, 1978, while this case was awaiting trial. Conn.Gen.Stat, §51-164s (1979).

[5]Interview with Herbert Silver, M.D., Director of Blood Bank and Immunohematology, Hartford Hospital, in Hartford, Connecticut (October 22, 1980). The cost of the test has recently been increased to $460. *Id.*

[6]The trial court later specifically found appellant to be indigent. (J.A. 23.)

The paternity action itself was tried before the court[7] on September 28, 1978. Appellant was still incarcerated at the time of trial and had been unable to afford a blood grouping test. Consequently, no such test was ever taken. (J.A. 12.) After the trial, on October 4, 1978, the court entered an order finding that appellant was the father of the child in question. (J.A. 2.)[8]

At a hearing in damages on October 16, 1978, the court found appellant liable for a total of $6,974.48 for the maintenance and support of the child in question through October 31, 1978, and attorney's fees. (J.A. 20.) Under Connecticut law, appellant will be additionally obligated to provide support for the child in question for the duration of her minority. Conn.Gen.Stat. §46b-215(a) (1979). The sole recipient of this judgment is the Connecticut Department of Finance and Control. (J.A. 21.)

Appellant appealed on the issue of whether the trial court erred in denying his Motion that the cost of a blood grouping test be paid by the State. On February 29, 1980, the Appellate Session of the Superior Court found no error. The Supreme Court of Connecticut denied certification on April 1, 1980.

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[7]Defendants in paternity proceedings in Connecticut, irrespective of means, may obtain jury trials only upon payment of a $45 fee. Conn.Gen.Stat. §52-258 (1979). *See Robertson v. Apuzzo,* 170 Conn. 367, 365 A.2d 824, *cert. denied,* 429 U.S. 852 (1976).

[8]Appellant admitted at the trial to a single act of intercourse with appellee at about the time Kenyatta Streater was conceived (J.A. 17), but presented testimony that appellee had also been intimate with a number of other men at the same time. Although appellee admitted a history of intimacy with one of appellant's witnesses, she denied that she had had sexual relations with any man other than appellant at the time of conception. (Untranscribed portion of September 28, 1978, testimony.) The trial judge evidently considered appellee to be the more credible witness.

HOW THE CONSTITUTIONAL QUESTION WAS RAISED AND DECIDED BELOW

At the earliest stage of the proceedings below, appellant raised the claim, in his Motion For Blood Grouping Test In Forma Pauperis, that the denial of an opportunity to obtain a blood grouping test because of his indigency "would deprive him of property without due process of law and deny to him the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States." (J.A. 5.) At this time, Conn.Gen.Stat. §46b-168 (1979) had not been construed as requiring the costs of blood grouping tests to be charged to the party moving for the tests irrespective of his means. Since the statute was not considered to be controlling by the trial court or either of the parties[9] there was no occasion at the trial level to draw its validity into question. The trial court's denial of appellant's Motion that the costs of blood grouping tests be paid by the State, however, plainly constituted a rejection of his constitutional claims.[10]

Appellant appealed to the Appellate Session of the Superior Court of Connecticut, reiterating his constitutional claims in his Assignment of Errors. While the instant case was on appeal, however, the Appellate Session rendered its decision in *Ferro v. Morgan,* 35 Conn. Supp. 679, 406 A.2d 873, *cert. denied,* 177 Conn. 753, 399 A.2d 526 (1979). In *Ferro,* the Appellate Session, for the first time, construed Conn.Gen.Stat. §46b-168(1979) as *mandating* that the

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[9]Conn.Gen.Stat. §46b-168 (1979) was not mentioned by the court or either party during the hearing on appellant's Motion. Transcript of December 5, 1977.

[10]In making its post-trial Findings, the trial court expressly rejected appellant's constitutional claims. (J.A. 23.)

costs of blood grouping tests be charged to the party moving for such tests, irrespective of his means, and upheld the constitutionality of this newly enunciated statutory requirement.

The Appellate Session considered appellant's constitutional claims in the instant case in light of its intervening decision in *Ferro v. Morgan.* It explicitly considered these claims as drawing the constitutionality of $46b-168 into question and expressly concluded that the statute does not violate the constitutional rights of indigent putative fathers. (J.A. 25.) The Supreme Court of Connecticut denied certification.

SUMMARY OF ARGUMENT

I.

Modern blood grouping tests conclusively exonerate more than 90% of all falsely accused defendants in paternity proceedings. Conn.Gen.Stat. §46b-168 (1979), which denies access to such tests to all defendants unable to pay for them, violates the Due Process Clause of the Fourteenth Amendment. Its denial of highly probative evidence solely on the basis of indigency is inconsistent with this Court's repeated concern for accuracy in the judicial process. A hearing characterized by such a denial is, moreover, not constitutionally meaningful where the person denied is an involuntary litigant; where he faces potential criminal consequences if he loses; where the State, with all its power and resources, is the real party haling him into court; where his indigence is caused by his incarceration by that very State; where a state evidentiary rule renders his testimony legally

insufficient to overcome the plaintiff's testimony, thus requiring him to produce other evidence if he is to prevail; and where the thing at issue is not something entirely reducible to monetary terms, but the paternity of a child.

II.

Connecticut's blood test rule creates two classes of involuntary litigants; those with assets, who can purchase swift, scientific, and reliable justice; and those without assets, who are thrust into swearing contests in which the pans of justice are loaded against them. Because there is no rational relationship between the ability to afford a laboratory fee and paternity or nonpaternity, and because the litigation at issue is fraught with criminal implications and has a direct impact on a family relationship, the egregious disparity in the quality of justice afforded these two classes of involuntary litigants denies indigent putative fathers the equal protection of the laws.

ARGUMENT

I. THE DENIAL OF BLOOD GROUPING TESTS TO A DEFENDANT IN A PATERNITY PROCEEDING SOLELY BECAUSE OF HIS INDIGENCY VIOLATES THE DUE PROCESS CLAUSE.

The novelty of the constitutional issue presented by this case should not obscure the palpable injustice that the appellant has suffered. The State of Connecticut caused Walter Little to be summoned into court where he was

required to prove that he was not the biological father of Kenyatta Streater.[11] He had a single realistic means of defending himself. A standard laboratory test, that scientifically and conclusively exonerates more than 90% of all falsely accused putative fathers, was readily available. The test, however, cost $250, and Walter Little had nothing. He was, moreover, precluded from raising this modest fee because he was incarcerated by the very State that was haling him into court. His request that the State pay for the test was denied. The test remained tantalizingly out of reach. The court thereafter pronounced him a parent, with all of the responsibilities that that status entails, and pronounced Kenyatta Streater the daughter of a criminal, solely on the basis of conflicting testimonial evidence. This procedure did not comport with the fundamental requirements of the Fourteenth Amendment.

A. The unique importance of blood grouping tests in paternity litigation.

The fundamental unfairness involved in the denial of blood grouping tests to an indigent putative father results from the unique importance of those tests in paternity litigation and from the special characteristics of paternity proceedings that distinguish them from garden variety civil actions. A proper appreciation of the importance of blood tests requires a brief description of their nature and history.

Inherited characteristics have doubless been used in the determination of paternity since ancient times, and judicial references to the genetic knowledge of the day date back

[11]Appellant's evidentiary burden is discussed at pp. 30-32, *infra*.

almost two centuries. *See Commissioners of Almshouse v. Whistelo,* 3 Wheeler's Crim. Cas. 194, 235 (N.Y. Gen. Sess. 1808). The discovery of human blood groups by Karl Landsteiner in Vienna at the beginning of this century, for which he received the 1930 Nobel Prize for Medicine, ultimately made it possible to scientifically exonerate innocent putative fathers on a wholesale basis.

Landsteiner's announcement in 1901 that human blood could be classified into three distinct groups (a fourth group was discovered in 1902) explained the hitherto unintelligible disasters that had previously resulted from attempted blood transfusions. Although it did not occur to Landsteiner at the time that serological propeties might be inherited, their application to paternity problems was recognized by two of his German colleagues in 1911. The first theory of heredity of the classical blood groups was mathematically revised in 1924. It thus became possible to scientifically prove that a given man could not possibly be the father of a given child. Thereafter, nothing stood in the way of applying blood tests in paternity actions. P. Speiser & F. Smekal, *Karl Landsteiner,* 91-93 (1975).

Courts in Europe were quick to utilize this opportunity to scientifically exclude innocent putative fathers. Blood tests were used in more than 5000 legal actions in Germany alone between 1924 and 1929. Schiff, *The Medico Legal Significance of Blood Groups,* 217 The Lancet 921, 921-22 (1929). Courts in Austria, Scandinavia, and Italy soon followed. L. Lattes, *Individuality of the Blood in Biology and in Clinical and Forensic Medicine* 253-54 (rev. ed. 1932).

Courts in this country responded somewhat more slowly. Although a putative father was exonerated by a blood test in *Commonwealth v. Zammarelli,* 17 Pa. D.&C. 229 (1931),

a well-reasoned New York decision ordering such a test was reversed on appeal. *Beuschel v. Manowitz,* 151 Misc. 899, 271 N.Y.S. 277, *rev'd per curiam,* 241 App. Div. 888, 272 N.Y.S. 165, *motion for leave to appeal denied,* 265 N.Y. 509, 193 N.E. 295 (1934). The New York Legislature, however, quickly passed a series of laws authorizing courts to order blood grouping tests in a variety of legal disputes, 1935 N.Y. Laws chs. 196-98, and an irreversible evidentiary trend had begun. The Connecticut courts were, ironically, among the first to recognize the evidential value of blood tests in paternity cases. *See, Domonkos ex rel. Herman v. Rotundo,* 4 Conn. Supp. 29 (C.P. 1936). In 1936, the Supreme Court of South Dakota became the first state court of highest jurisdiction to acknowledge the usefulness of blood tests in the judicial truthseeking function. *State v. Damm,* 64 S.D. 309, 266 N.W. 667 (1936).

Judicial acceptance of the reliability of blood grouping tests in excluding the paternity of innocent putative fathers is now, for all practical purposes, complete and universal. The most prolific commentator on paternity litigation has noted:

> As far as the accuracy, reliability, dependability - even infallibility - of the test are concerned, there is no longer any controversy. The result of the test is universally accepted by distinguished scientific and medical authority. There is, in fact, no living authority of repute, medical or legal, who may be cited adversely. . . .
>
> [T]here is now. . .practically universal and ananimous judicial willingness to give decisive and controlling evidentiary weight to a blood test exclusion of paternity.

1 S. Schatkin, *Disputed Paternity Proceedings* §9.13 at 9-38-40 (rev. ed. 1979).

As judicial acceptance of blood grouping tests has grown, the tests themselves have become capable of exonerating a

steadily increasing percentage of innocent putative fathers. A few years ago a falsely accused man had only a 50-55% chance of scientifically proving his nonpaternity. *See State v. Fowler,* 277 N.C. 305, 308, 177 S.E. 2d 385, 387 (1970); McCormick's *Law of Evidence* § 211 at 519 (2d ed. 1972).[12] Those statistics are now ancient history. There has, in recent years, been a scientific "revolution" in the use of blood group systems in cases of disputed paternity as a result of the introduction of the HLA (for human, leukocyte, antigen) system of testing. Terasaki, *Resolution by HLA Testing of 1000 Paternity Cases Not Excluded by ABO Testing,* 16 J.Fam.L. 543 (1978).

Whereas previous tests were based on red blood cell groupings, the HLA test is based on tissue typing of the white blood cells. *See Cramer v. Morrison,* 88 Cal. App. 3d 873, 877-78, 153 Cal.Rpotr. 865, 867 (1979) (discussing Dr. Terasaki's trial testimony). It is readily available, reasonably inexpensive, and dramatically effective. It conclusively excludes *91%* of falsely accused putative fathers, in the case of blacks,[13] and *93%* in the case of whites. Krause, *Joint AMA-ABA Guidelines: Present Status of Serological Testing in Problems of Disputed Parentage,* 10 Fam.L.Q. 247, 258 Table 3 (1976). *Accord, Hepfel v. Bashaw,* 279 N.W. 2d 342, 347 (Minn. 1979); *State ex rel. Ortloff v. Hanson,* 277 N.W.2d 205, 207 (Minn. 1979); *Lascaris v. Lardeo,* 100 Misc. 2d 220, 222, 417 N.Y.S. 2d665, 666 (1979). This effectiveness is sufficiently great to distinguish modern blood

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[12]The Appellate Session of the Superior Court of Connecticut has grounded its recent blood test decisions on this badly outdated factual assumption. *Ferro v. Morgan,* 35 Conn. Supp. 679, 685, 406 A.2d 873, 877, *cert. denied,* 177 Conn. 753, 399 A.2d 526 (1979).

[13]Both of the named parties in the instant case are black.

grouping tests from virtually all other conceivable items of potentially exculpatory evidence and to make the denial of those tests to indigent putative fathers an injustice of constitutional proportions.

The availability of this scientific evidence is crucial in paternity litigation because testimonial evidence in such proceedings is inherently susceptible to doubt. In a series of recent cases involving discriminations against illegitimate children, this Court has repeatedly noted the peculiar difficulties involved in proving the paternity of such children. *Parham v. Hughes,* 441 U.S. 347, 355 (1979) (plurality opinion); *id.* at 360 (Powell, J. concurring); *Lalli v. Lalli,* 439 U.S. 259, 268-69 (1978) (plurality opinion); *Trimble v. Gordon,* 430 U.S. 762, 772 (1977); *Gomez v. Perez,* 409 U.S. 535, 538 (1973). *See Caban v. Mohammed,* 441 U.S. 380, 405 (1979) (Stevens, J. dissenting); *Stanley v. Illinois,* 405 U.S. 645, 665 (1972) (Burger, C.J. dissenting). Perhaps the best judicial expression of these difficulties of proof was written by Justice Brennan when he sat on the Appellate Division of the New Jersey Superior Court:

> [I]n the field of contested paternity. . .the truth is so often obscured because social pressures create a conspiracy of silence or, worse, induce deliberate falsity.
>
> The value of blood tests as a wholesome aid in the quest for truth in the administration of justice in these matters cannot be gainsaid in this day.

Cortese v. Cortese, 10 N.J. Super. 152, 156, 76 A.2d 717, 719 (1950).

Testimony from accurate or reliable eye-witnesses is rarely available in paternity cases since the sexual activities at issue "usually take place in intimate and private surroundings, and the self-serving testimony of a party is of questionable reliability." Larson, *Blood Test Exclusion Procedures in*

Paternity Litigation: The Uniform Acts and Beyond, 13 J.Fam.L. 713, 713 (1974). The peculiar unreliability of testimonial evidence in paternity actions is a particularly grave matter because every scientific study done on the matter indicates that a very large number of defendants in such proceedings have been falsely accused.

The advent of blood grouping tests has made it possible to measure the percentage of innocent putative fathers with some precision In 5500 paternity actions litigated in Europe in the 1920's blood tests exonerated defendants in 8% of the cases. Since the blood tests of that day were incapable of excluding more than 16% of all innocent putative fathers, the first scientific commentator observed that "roughly *every second man had been denounced unjustly.*" Schiff, *The Medico legal Significance of Blood Groups,* 217 *The Lancet* 921, 922 (1929) (emphasis added). A later study of 6655 paternity cases in several European countries also concluded that "[H]alf of the defendants in these cases were falsely accused." A. Weiner, *Blood Groups and Transfusion* 383 (3d ed. 1943). Studies in this country have reached similar conclusions. One survey of 1000 disputed paternity cases in New York City in which blood tests were used showed that 39.6% of men denying paternity were falsely accused. Sussman, *Blood Grouping Tests,* 40 Am.J.Clinical Pathology 38,38 (1963).[14] For the results of other blood test studies yielding similar statistical results *see* 1 S. Schatkin,

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[14]Perhaps even more disturbing, a companion study demonstrated that 18% of paternity defendants who *admitted* paternity "were not the fathers of the children they accepted as their offspring." Sussman, *Blood Grouping Tests,* 40 Am.J. Clinical Pathology 38, 39-40 (1963).

Disputed Paternity Proceedings, § § 9.05-9.09 at 9-12-26 (rev. ed. 1979).[15]

Scientific evidence is typically superior to testimonial evidence for a number of obvious reasons. But the gulf that yawns between modern blood test evidence on the one hand and the self-serving testimony of parties on the other in paternity litigation is vast beyond compare. We do not suggest, of course, that it is impossible for a factfinder in a paternity case to arrive at the correct result by hearing testimony. In some cases it will be obvious who is telling the truth and who is not; in others the correct result may be arrived at by what is more or less a guess. We do suggest, however, that false testimony and innocent defendants are commonplace in paternity proceedings and that, in the absence of blood test evidence, it is inevitable that innocent men will be convicted with an intolerable regularity.

The denial of this crucial evidence to indigent defendants typically deprives them of the only persuasive evidence they could possibly present in court, and thereby renders the

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[15]Lie detector studies have yielded similar results. A six year study of disputed paternity cases in Chicago, in which the parties submitted to polygraph tests following their courtroom testimony, showed that "93 percent of the tested parties lied in some respect when they testified in court as to their sexual relationship," and that in over 47% of the cases the complainant "was reported lying when she denied having intercourse with anyone else but the defendant during the conception period. In the great majority of cases the lying mother confessed to the lie-detector examiner that she had lied in court." Arther & Reid, *Utilizing the Lie Detector Technique to Determine the Truth in Disputed Paternity Cases,* 45 J.Crim.L., Criminology & Police Sci. 213, 215, 217 (1954).

Such statistical evidence corroborates the frequently cited remarks of Lord Merthyr in the House of Lords. "In my experience of these cases, apart from one other class - namely, fish-poaching cases - there is no class of case in which there is a greater degree of perjury in the courts." 229 Parl.Deb.H.L. (5th ser.) 1090 (1961).

resulting judgmental process infinitely more capricious. These factual considerations, combined with the distinctive *legal* characteristics of paternity proceedings discussed *infra,* bring the injustice worked upon Walter Little to the heart of the historic concerns of the Fourteenth Amendment.

B. The Requirements of the Due Process Clause.

Nothing is more remarkable in this case than the almost total isolation of Connecticut law. The only State other than Connecticut that requires all defendants in paternity proceedings, irrespective of means, to pay for blood grouping tests in advance of trial or otherwise do without such evidence altogether is North Carolina.[16] The vast majority of American jurisdictions, either expressly or by implication, provide some mechanism giving indigent putative fathers access to blood tests.[17] The constitutional ruling of the court below in

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[16]*See* N.C.Gen.Stat. § 8-50.1 (Supp. 1979).

[17]Twenty-five states and the District of Columbia expressly allow the costs of such tests to be charged to the State, county, municipality, or a public agency. Of these, nineteen states and the District of Columbia do so by statute. Ala. Code tit. 26 § 12-5 (1977); Ark. Stat.Ann. § 34-705.1 (1962); Cal. Evid. Code § 894 (Deering 1966), *see B. v. Superior Court,* 86 Cal. App. 3d 1006, 150 Cal.Rptr. 586 (1978); Haw.Rev.Stat. § 584-16 (1976); Idaho Code § 7-1117 (1979); Ill. Rev.Stat. ch.106 3/4 § 3 (Supp. 1980-81); Kan. Stat. § 23-132 (1974) (the fees are subsequently taxed as costs); La. Rev. Stat. Ann. § 9:397.1 (West Supp. 1980); Md. Ann. Code art. 16 § 66G (Supp. 1980); Mich. Stat. Ann. § 25.496(c) (1974); 1980 Minn. Sess. Law Serv. ch. 589 § 19 (West) (to be codified as Minn. Stat. § 257.69); N.H. Rev. Stat. Ann. § 522.3 (1974); N.Y. Fam. Ct. Act § 532 (McKinney Supp. 1976-79), *see People ex rel. Van Epps v. Doherty,* 261 App. Div. 86, 24 N.Y.S. 2d 821 (1941); N.D. Cent. Code § 14-17-15 (Supp. 1977); Or. Rev. Stat. § 109.256 (1979); 42 Pa. Cons. Stat. Ann. § 6132 (Purdon Supp. 1980); Tex. Fam. Code Ann. § 13.03 (Vernon Supp. 1980) (if the Texas Department of Human Resources "is a party of the suit"); Utah Code

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Ann. §78-25-23 (1977); Wis. Stat. Ann. §52.36 (2) (West Supp. 1980-81) (the fees are subsequently taxes as costs); 16 D.C. Code §2343 (1973). The Supreme Courts of Colorado, Massachusetts, and West Virginia have held payment by the State to be constitutionally required. *Franklin v. District Court,* 194 Colo. 189, 571 P.2d 1072 (1977), *commonwealth v. Possehl,* 355 Mass. 575, 246 N.E.2d 667 (1969); *State ex rel. Graves v. Daugherty,* 266 S.E.2d 142 (W.Va. 1980). Such tests are judicially charged to the State in New Jersey by the inherent power of the courts in that State. *Smith v. Walker,* 138 N.J.Super. 187, 350 A.2d 319 (1975). Such tests are charged to the State in Kentucky by virtue of Ky.Op. Att'y Gen. 65-391. In Indiana, it is the policy of the Department of Public Welfare to pay for blood tests where the prosecuting attorney requests such a test or where the parties stipulate that the test results will be admitted into evidence. Letter from Thomas W. McKean, Director, Indiana Child Support Division, Department of Public Welfare to IV-D Deputy Prosecuting Attorneys (December 4, 1979) (unpublished letter on file in the office of appellant's attorney).

In addition, the statutes of five states give the courts of those states unlimited power to determine how and by whom such costs shall be paid. Me. Rev. Stat. tit. 19§279 (Supp. 1980-81); Miss. Code Ann. §93-9-25 (1972); Nev. Rev. Stat. §56. 020 (1979); Ohio Rev. Code Ann. §3111.16 (Baldwin 1976); R.I. Gen. Laws §15-8-13 (Supp. 1980). These statutes clearly provide local courts with the necessary authority to order that such costs be paid by the state where one or both of the parties are indigent. Ohio courts have not, however, been in agreement on whether that state should be charged in cases involving indigent defendants. *Compare Walker v. Stokes,* 45 Ohio App.2d 275, 344 N.E.2d 159 (1975) (holding such payment to be constitutionally required) *with Bigsby v. Bates,* 59 Ohio Misc. 51, 391 N.E.2d 1384 (C.P. 1978) (holding free blood tests not required in light of *Walker v. Stokes,* 54 Ohio App.2d 119, 375 N.E.2d 1258 (1977) (stripping state of its power to jail for nonsupport).

Somewhat more ambiguously, the statutes of five more states simply provide that local courts "may" in their discretion, order such costs to be paid by the parties. Ga. Code §74-311 (Supp. 1980); Tenn. Code Ann. §24-716 (Supp. 1979); Va. Code §20-61.2 (Supp. 1980); Wash. Rev. Code Ann. §26.26.140 (Supp. 1980-81); Wyo. Stat. §14-2-114 (1978). These statutes appear to provide local courts with at least some authority to charge such costs to the state where one or both of the parties are indigent.

the instant case is no less idiosyncratic. *Every* state appellate court outside of Connecticut that has considered the issue has concluded that putative fathers may *not* constitutionally be denied access to blood tests on the basis of indigency. *Franklin v. District Court,* 194 Colo. 189, 571 P.2d 1072 (1977); *Commonwealth v. Possehl,* 355 Mass. 575, 246 N.E.2d 667 (1969); *Walker v. Stokes,* 45 Ohio App. 2d 275, 344 N.E.2d 159 (1975); *State ex rel. Graves v. Daugherty,* 266 S.E 2d 142 (W.Va. 1980).[18] A consideration of the

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Although the relevant statutes in Alaska are unclear, courts in that State would, in all probability, order such payment by virtue of *Reynolds v. Kimmons,* 569 P.2d 799 (Alas. 1977) (holding that indigent putative fathers have a due process right to counsel where the complainant is represented by the State). In Nebraska, a District Court judge ordered the costs of blood tests to be paid from public funds in an illegitimacy case remanded by the Supreme Court of Nebraska in *Ford v. Ford,* 191 Neb. 548, 216 N.W.2d 176 (1974). *Ford v. Ford,* Doc. 655, No. 275 (Dist. Ct. Douglas Cty. Neb. Feb. 21, 1975). The laws of the remaining eleven States (Arizona, Delaware, Florida, Iowa, Missouri, Montana, New Mexico, Oklahoma, South Carolina, South Dakota, and Vermont) are unclear.

[18]A Family Court judge in New York has also reached this conclusion in a particularly well-reasoned opinion. *Lascaris v. Lardeo,* 100 Misc.2d 220, 417 N.Y.S. 2d 665 (Fam.Ct. 1979). *See Reynolds v. Kimmons,* 569 P.2d 779 (Alas. 1977), and *G. v. R.,* 95 Misc. 2d 273, 407 N.Y.S. 2d 414 (Fam. Ct. 1978) (giving indigent putative fathers the constitutional right to counsel). *Cf. M. ex rel. T. v. S.,* 169 N.J. Super. 209, 404 A.2d 653 (1979); *Lurry v. Mills,* 152 N.J. Super. 127, 377 A.2d 804 (1977); *Smith v. Walker,* 138 N.J. Super. 187, 350 A.2d 319 (1975) (giving indigent putative fathers the right to a blood test by virtue of the inherent powers of the New Jersey courts but drawing extensively on constitutional precedent and reasoning).

This single exception to this unbroken line of cases in other states is *Bigsby v. Bates,* 59 Ohio Misc. 51, 391 N.E.2d 1384 (C.P. 1978), holding that free blood tests are not required in Ohio in light of *Walker v. Stokes,* 54 Ohio App. 2d 119, 375 N.E. 2d 1258 (1977) (stripping Ohio of its power to jail for non-support). Because *Bigsby* is merely a memorandum of a single trial judge its authority is limited even in Ohio. It plainly has no relevance to states such as Connecticut which retain full power to jail for nonsupport. *See* Conn.Gen.Stat. § § 46b-215, 53-304 (1979).

fundamental requirements of the Due Process Clause and of the distinctive legal characteristics of paternity proceedings, makes it clear that the profound isolation of Connecticut law on this issue is eminently deserved.

We start with the proposition that the fact that a man is haled into court as a civil, as distinct from a criminal, defendant does not wholly strip him of basic constitutional protections. He has an indubitable right to be heard. Daniel Webster argued in the *Dartmouth College* case that "the law of the land" is "a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial." *Trustees of Dartmouth College v. Woodward,* 17 U.S. (4 Wheat.) 518, 581 (1819). This Court noted well before the Civil War that in our jurisprudence "no man shall be condemned in his person or property without . . . an opportunity to make his defense," *Boswell's Lessee v. Otis,* 50 U.S. (9 How.) 336, 350 (1850), and repeated this observation a number of times before finally giving it constitutional significance in *Hovey v. Elliott,* 167 U.S. 409, 45, 444 (1897). *See Windsor v. McVeigh,* 93 U.S. 274, 277 (1876); *Baldwin v. Hale,* 68 U.S. (1 Wall.) 223, 233 (1864); *Nations v. Johnson,* 65 U.S. (24 How.) 195, 203 (1861).

This fundamental theme has continually recurred in this century.[19] This Court stated in *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313 (1950), that:

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

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[19]*See Boddie v. Connecticut,* 401 U.S. 371, 377-78 n.3 (1971).

In a perhaps even more celebrated statement, this Court declared in *Boddie v. Connecticut,* 401 U.S. 371, 377 (1971), a case involving civil *plaintiffs,* that "[D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."

Boddie was, of course, concerned with a class of litigants (in that case, would-be divorce plaintiffs) who were literally excluded from the courtroom by a filing fee, just as the defendants in *Hovey, Windsor,* and *Baldwin* had been totally denied an opportunity to appear in cases involving their property interests. But although the physical opportunity to appear in the courtroom, without more, doubtless satisfies the notice and hearing requirements of the Due Process Clause in the typical civil case, it does not follow that such an opportunity, in and of itself, necessarily satisfies those requirements in every case. This Court has, by way of analogy, never been satisfied with the mere assertion of notice. Rather, it has assiduously scrutinized forms of notice to ensure that such notice is *meaningful. Mullane* is a well-known example of this scrutiny; other examples stretch back to *Nations* and *Boswell's Lessee.*

This Court's pronouncements in *Mullane* and *Boddie* similarly indicate that the requirement of the Due Process Clause that civil defendants be granted an opportunity to appear has a qualitative aspect and is not in every case satisfied by the mere form of a hearing. *Mullane*'s language, if not its holding, indicates that there must be an "opportunity for hearing *appropriate to the nature of the case*," 339 U.S. at 313 (emphasis added). *Boddie* emphatically states that there must be a *meaningful* opportunity to be heard," 401 U.S. at

377 (emphasis added). It is implicit in these pronouncements that in limited circumstances, where the outcome of a nominally civil action is particularly consequential, this court has reserved the power to scrutinize the hearing given an involuntary litigant to ensure that it is, in some fundamental sense, meaningful. It is our contention that, if a defendant in a paternity proceeding is, solely because of indigency, denied an otherwise readily available laboratory test that conclusively exonerates more than 90% of all innocent defendants, he has been denied a meaningful hearing in the constitutional sense of that term.

The denial of a blood test under these circumstances is the denial of a meaningful hearing in part because the resulting suppression of such an overwhelmingly probative item of evidence will inevitably "impede unacceptably the truth-finding functions of judge and jury." *United States v. Payner,* 100 S.Ct. 2439, 2445-46 (1980). *Payner* is only the most recent example of this Court's repeated concern for accuracy in the judicial process. In a series of cases involving the fourth Amendment this Court has given constitutional significance to the jurisprudential notion that adjudications of fact should be grounded "on the basis of all the evidence which exposes the truth." *Alderman v. United States,* 394 U.S. 165, 175 (1969). *See Rakas v. Illinois,* 439 U.S. 128, 137 (1978); *United States v. Ceccolini,* 435 U.S. 268, 276 (1978); *Stone v. Powell,* 428 U.S. 465, 490 (1976).

There is, thus, a "strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce." *Michigan v. Tucker,* 417 U.S. 433, 450 (1974). This interest is in part philosophical. "The end of litigation is justice. Knowledge of the truth is essential thereto." *Union*

Pacific Railway v. Botsford, 141 U.S. 250, 258 (1891) (Brewer, J. dissenting).[20] There is also a more pragmatic strain to this interest. If the courts of this country either directly or indirectly suppress highly probative evidence and proceed on the basis of infinitely less reliable evidence to render factual adjudications the accuracy of which is open to obvious doubt, what this Court has called "the moral force" of the law, *In re Winship,* 397 U.S. 358, 364 (1970), will be ineluctably diluted. Such a deflection of "the truthfinding process. . .may well have the. . . effect of generating disrespect for the law and the administration of justice." *Stone v. Powell, supra,* 428 U.S. at 490-91.

These considerations have historically been at the heart of judicial rulings concerning blood tests. The first appellate decision affirming the reliability of blood tests declared that "The primary function of the judiciary is the administration of justice, and justice can never be rightly administered unless truth be first ascertained as nearly as may be." *State v. Damm,* 64 S.D. 309, 316, 266 N.W. 667, 670 (1936). As noted, *supra,* Justice Brennan as a state appellate judge spoke of blood grouping tests as "a wholesome aid in the quest for truth in the administration of justice." *Cortese v. Cortese,* 10 N.J. Super. 152, 156, 76 A.2d 717, 719 (1950). It is particularly important that when this Court considered the somewhat different blood tests at issue in *Schmerber v. California,* 384 U.S. 757 (1966), and *Breithaupt v. Abram,* 352 U.S. 432 (1957), it upheld them in large part on these grounds. Society, the Court stated in *Breithaupt,* has an interest "in the scientific determination of intoxication. . . .

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[20] "Our goals are truth and justice, and procedures are but means to these ends." Oaks, *Ethics, Morality, and Professional Responsibility,* 1975 B.Y.U. L.Rev. 591, 596 (1975).

And the more so since the test. . .may establish innocence, thus affording protection against the treachery of judgment based on one or more of the senses." 352 U.S. at 439.

There are obvious and necessary limits on this Court's power to ensure that judicial proceedings are meaningful and accurate in fact. The decisions of this Court cannot bestow our society with the resources to provide, for example, counsel and expert witnesses to uncounted numbers of civil litigants. Such accounterments are, in any event, typically marginally helpful rather than absolutely crucial to the accurate adjudication of fact. The denial of readily available blood tests to indigent putative fathers is, however, a quite different matter. This denial is at once the deprivation of an indispensible and irreplacable opportunity of exoneration and an injustice readily correctible by this Court at an almost pitifully modest cost to society.[21] Justice Frankfurter suggested a like distinction in the *Griffin* case:

> Law addresses itself to actualities. . . Of course a State need not equalize economic conditions. A man of means may be able to afford the retention of an expensive, able counsel not within reach of a poor man's purse. Those are contingencies of life which are hardly within the power, let alone the duty, of a State to correct, or cushion. But when a State deems it wise and just that convictions be susceptible to review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted indigent persons, forsooth erroneously convicted, from securing such a review merely by disabling them from bringing to the

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[21]In this respect, it is important to note that a provision by the State of blood tests to indigent putative fathers in advance of trial need not be a gratuitous subsidy. The cost of the test could be taxed as costs to the losing party. *See* Kan. Stat. §23-132 (1974); Wis. Stat. Ann. §52.36(2) (West Supp. 1980-81).

> notice of an appellate tribunal errors of the trial court which would upset the conviction were practical opportunity for review not foreclosed.

Griffin v. Illinois, 351 U.S. 12, 23 (1956) (Frankfurter, J. concurring).

Similarly where a standardized, universally recognized laboratory test that conclusively establishes nonpaternity in more than 90% of all cases involving falsely accused defendants is readily available, the State may not disable indigent defendants, forsooth innocent, from bringing this evidence to the notice of the trial court. Without this evidence, the indigent defendant is placed in a swearing contest[22] with the plaintiff in which the judge[23] must, often desperately, rely on his subjective instincts, rather than hard scientific data, as to which witness is telling the truth. This denial of evidence obviously robbed the hearing below of a great deal of meaning. Had this not been a paternity action, the hearing might well have remained *constitutionally* meaningful. But, in this case, considerations arising from the unique legal character of paternity litigation and the circumstances of the defendant collectively require an unusually stringent standard of judicial review, which, if exercised, must necessarily conclude that the denial of a blood test made the proceedings below unmeaningful in a constitutional sense.

First. This action involves the denial of an essential item of evidence to a *defendant.* This Court has drawn a constitutional distinction between the rights accorded persons involuntarily " 'haled into court' by the State" and

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[22]In Connecticut, moreover, this swearing contest is one that is heavily biased in favor of the plaintiff. *See* pp. 30-32, *infra.*

[23]Not, in Connecticut, a jury. *See* n.7, *supra.*

voluntary litigants seeking to use rights as a sword rather than a shielf. *Ross v. Moffitt,* 417 U.S. 600, 610-11 (1974). *Boddie v. Connecticut* recognized that the principles of due process enunciated by this Court over the years have typically concerned the "rights of defendants compelled to litigate their differences in the judicial forum." 401 U.S. at 785. The truly novel feature of *Boddie* was its extension of those rights to a class of civil plaintiffs on the basis of the State's monopoly of divorce adjudication. The appellant in the instant case need not, of course, be analogized to a defendant; he *is* a defendant.

This obvious fact serves to readily distinguish the instant case from *United States v. Kras,* 409 U.S. 434 (1973) (refusing to waive filing fees to an indigent petitioner in bankruptcy), and *Ortwein v. Schwab,* 410 U.S. 656 (1973) (refusing to waive filing fees to an indigent wishing to appeal a denial of welfare benefits). *Ortwein* and *Kras* were grounded on "the existence of alternatives. . . to the judicial remedy" available to the litigants in those cases. *Ortwein, supra,* 410 U.S. at 659. In contrast, "the utter exclusiveness of court access and court remedy. . . was a potent factor in *Boddie*." *Kras, supra,* 409 U.S. at 445. The appellant here did not choose to file a legal action as one of several available paths to relief. Rather, the State caused the appellee to summon him to court against his will. His presence in court was wholly involuntarily, and he is entitled to all of the due process protections traditionally accorded to involuntary litigants.

Second. In Connecticut, as in most states, a losing defendant in a paternity proceeding becomes subject to a number of potential criminal and quasi-criminal sanctions not present in the ordinary civil case.[24] The appellant here

[24]The perhaps unparalleled absence of such sanctions in Ohio was the basis of the memorandum decision in *Bigsby v. Bates,* discussed in n.18, *supra.*

has, of course, already been found liable for thousands of dollars in support payments and is additionally obligated to provide support for the child in question for the duration of her minority. Conn.Gen.Stat. §46b-215(a) (1979). Should he subsequentily fail to comply with any support order he will be subject to imprisonment for contempt of court. *Id.*

Even more seriously, appellant will further be subject to criminal prosecution and imprisonment for nonsupport. Conn.Gen.Stat. §53-304(a) provides that:

> Any person who neglects or refuses to furnish reasonably necessary support to his. . . child under the age of eighteen. . . shall be deemed guilty of nonsupport and shall be imprisoned not more than one year, unless he shows to the court. . . that, owning to physical incapacity or other good cause, he is unable to furnish such support. . . . [T]he term "child" shall include one born out of wedlock whose father. . . has been adjudged the father by a court of competent jurisdiction.

While §53-304 as a criminal statute requires proof beyond a reasonable doubt of each of the elements of nonsupport, the statute makes it clear that the issue of paternity itself, once adjudicated in a paternity proceeding, is *res judicata* and cannot be relitigated.

The initial paternity proceeding, therefore, has inescapable criminal overtones. This characteristic renders the action quasi-criminal in nature[25] and has been influential in

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[25]Although the Supreme Court of Connecticut characterized paternity proceedings as "civil" rather than "criminal" in *Robertson v. Apuzzo,* n.7 *supra,* such an adroit act of pigeonholing erases neither the existence of the criminal sanctions discussed in the text nor the fact that these sanctions are not involved in the ordinary civil case. *Cf. Smith v. Bennett,* 365 U.S. 708, 712 (1961) ("The availability of a procedure to regain liberty lost through criminal process cannot be made contingent upon a choice of labels"). It is, of course, implicit in our entire argument that paternity proceedings are demonstrably different from garden-variety civil litigation and that the civil/criminal distinction is therefore hardly talismanic.

persuading a number of state courts that the denial of blood tests in such an action is inconsistent with the dictates of the Fourteenth Amendment. *See Franklin v. District Court,* 194 Colo. 189, 191 n.1, 571 P.2d 1072, 1074 n.1 (1977); *Walker v. Stokes,* 45 Ohio App. 2d 275, 278, 344 N.E. 2d 159, 161 (1975); *State ex rel. Graves v. Daugherty,* 266 S.E. 2d 142, 146 (W.Va. 1980). But in any event, regardless of labels, the proceeding below implicated appellant's liberty, as well as property, interests, and therefore warrants an appropriately elevated level of scrutiny.

Third. Although the instant case is nominally a private affair, it is in fact a case in which the full power of the *State* has been brought against an indigent defendant in a judicial proceeding. In the first place, of course, the proceeding below was conducted in a state court and affirmed by a state appellate tribunal. "The judicial action. . . bears the clear and unmistakable imprimatur of the State." *Shelley v. Kraemer,* 334 U.S. 1, 20 (1948). The State, moreover, lurks in the background of every paternity proceeding in Connecticut by virtue of the potential criminal and contempt sanctions discussed *supra.* But the State is much more directly involved in the instant case. Since appellee is a recipient of public assistance, the decision to summon appellant into court was made not by her but by the Connecticut Department of Social Services. That Department referred this case to appellee's eventual attorney "for prosecution" (J.A. 10). The State not only paid that attorney some $300 to prosecute appellant (J.A. 20) but is the actual recipient of the several thousand dollars of support money awarded by the trial court (J.A. 21).

This procedure is, in fact, mandated by both state and federal law. Conn.Gen.Stat. §46b-169(a) (1979) compels the mother of any child born out of wedlock to disclose the

nameof the child's putative father to the welfare authorities if the child is a recipient of public assistance.[26] That statute further compels her "to institute an action to establish the paternity of said child." Connecticut's requirement is, furthermore, mandated by 42 U.S.C. §654 (4) (1976), which requires the States "to establish the paternity" of illegitimate children receiving AFDC payments and "to secure support for such child from his parents."[27] *See* 45 C.F.R. §232.12 (1979). Because of these requirements, state action has been institutionalized in paternity proceedings involving recipients of public assistance.

It has been clear since the *Civil Rights Cases,* 109 U.S. 3 (1883), that the abrogation and denial of rights by the States "was the great seminal and fundamental wrong which was intended to be remedied" by the Fourteenth Amendment. *Id.* at 18. But as this Court has also observed, "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." *Evans v. Newton,* 382 U.S. 296, 299 (1966). *See Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961). Such "state action" permeated the entire proceeding in the instant case. Because

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[26]The constitutionality of this disclosure requirement has been twice before this Court but was left unresolved by the Court on both occasions. *Maher v. Doe,* 432 U.S. 526 (1977); *Roe v. Norton,* 422 U.S. 391 (1975).

[27]Although Connecticut's statutory requirement, originally enacted by 1971 Conn.Pub.Acts. No. 439 §4, predates the federal one, enacted as part of the Social Services Amendments of 1974, 88 Stat. 2337, 2359-60, the federal statute has now largely preempted the field, and Connecticut is no longer free to significantly alter its requirement. "[V]ery little area is left open for state action." *Doe v. Maher,* 414 F.Supp. 1368, 1378 (D.Conn. 1976), *vacated,* 432 U.S. 526 (1977).

of this undeniable fact, the legal actions of the appellee, nominally a private citizen, were essentially the actions of the State for purposes of the Fouirteenth Amendment.[28]

Fourth. It is of particular significance in this case that the reason that Walter Little was so poor as to be unable to afford a modest laboratory fee was that he was incarcerated by the very State that was simultaneosly expending the necessary funds to hale him into court. This incarceration, of course, rendered him indigent beyond peradventure. Physically cut off by the State from any opportunity of employment, the small sums that were within the "able-bodied reach" of the petitioner in bankruptcy in *United State sv. Kras,* 409 U.S. 434, 449 (1973), were beyond the wildest dreams of the appellant in this case. He quite simply had no ability to present any defense requiring any expenditure of funds whatsoever. *See Klapprott v. United States,* 335 U.S. 601, 614 (1949) (plurality opinion).

While the States are, of course, free to imprison persons in punishment for crime, the litigational disabilities that inevitably attend incarceration impose some corresponding responsibilities on the incarcerating authorities. This Court has long prohibited prison officials from physically impeding their charges from sending petitions to the Courts. *Cochran v. Kansas,* 316 U.S. 255 (1942); *Ex parte Hull,* 312 U.S. 546 (1941). The Court has, however, also acknowledged the

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[28]*See G.v. R.*, 95 Misc. 2d 273, 275-76, 407 N.Y.S. 2d 414, 416 (Fam.Ct. 1978). The facts of this case make it unnecessary for the Court to decide the much more difficult question of whether an indigent defendant in a paternity proceeding brought by a plaintiff unassisted by the State is also constitutionally entitled to a blood test. We note, however, that this latter problem is much more academic than real since few if any private individuals, as distinct from the State, will choose to retain counsel and pay the necessary court fees to bring a lawsuit against an indigent.

fact that, for an incarcerated person, mere physical access to the Courts, without more, is often constitutionally insufficient. Thus, in *Johnson v. Avery,* 393 U.S. 483 (1969), the Court held that, in the absence of some viable alternative, the States may not prohibit "jailhouse lawyers" from assisting their fellow inmates in the preparation of petitions for habeas corpus relief. In doing so, the Court recognized that "In the case of all except those who are able to help themselves. . . the prisoner is, in effect, denied access to the courts unless such help is available." 393 U.S. at 488.

But this Court has also required the States to shoulder *affirmative* responsibilities to offset the litigational difficulties necessarily confronting prisoners.[29] In *Bounds v. Smith,* 430 U.S. 817 (1977), the Court held that, in the absence of some reasonable alternative, state prison officials must provide their charges with adequate law libraries. The Court emphatically stated that it will require "remedial measures to insure that inmate access to the courts is adequate, effective, and meaningful." *Id.* at 822. But just as the physical ability to communicate with the courts is often unmeaningful to prisoners who lack all access to legal materials, physical presence in court will sometimes be unavailing if a prisoner defendant lacks all access to the only effective evidence that he could possibly produce. It follows from *Bounds* that, if the States choose to litigate against their prisoners, this Court should scrutinize the hearings given those inmates to ensure that, in some fundamental sense, they are "adequate, effective, and meaningful."

Fifth. The factors of involuntariness, potential criminal

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[29]*Cf. Estelle v. Gamble,* 429 U.S. 97, 103 (1976) (establishing "the government's obligation to provide medical care for those whom it is punishing by incarceration").

sanctions, state action, and an incarcerated defendant, taken together, strongly indicate that a celebrated line of this Court's decisions involving the rights of indigent criminal defendants is applicable to the instant case. In *Griffin v. Illinois,* 351 U.S. 12 (1956), this Court held that the Fourteenth Amendment compels a State to furnish a transcript of his criminal trial to an indigent criminal defendant on appeal. Noting the disparity between the ability of indigent and non-indigent defendants to obtain adequate appellate review under then-existing practice, a plurality of the Court decided the case on the broad ground that "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Id.* at 19. Following *Griffin,* the Court required the provision of appointed counsel on an appeal as of right from a criminal conviction in *Douglas v. California,* 372 U.S. 353 (1963).

Under the principle of these cases, the States are obligated to provide indigent criminal defendants with items of evidence necessary for pretrial preparation. *See Britt v. North Carolina,* 404 U.S. 226, 227 (1971) ("[T]he State must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal"); *Roberts v. LaVallee,* 389 U.S. 40, 42 (1967) ("[D]ifferences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution"). The Court has further made it clear that *Griffin* and *Douglas* are not dependent upon nomenclature and that they apply to at least some nominally civil proceedings. *See Gardner v. California,* 393 U.S. 367 (1969) (habeas corpus); *Long v. District Court,* 385 U.S. 192 (1966) (habeas corpus); *Lane v. Brown,* 372 U.S. 477 (1963) (coram nobis); *Smith v. Bennett,* 365 U.S. 708 (1961)

(habeas corpus). Even more important, this Court has extended the principle of *Griffin* to a case involving a mere $250 fine. *Mayer v. City of Chicago,* 404 U.S. 189 (1971). In doing so the Court looked in part to the practical effects of the proceeding involved. "A fine," it observed "may bear as heavily on an indigent accused as forced confinement." *Id.* at 197.

While criminal defendants stand on a particularly exalted constitutional plane for obvious reasons, the underlying principles involved in the *Griffin-Roberts-Britt-Mayer* line of cases are plainly relevant to the instant case. Here, as in those cases, the full power of the State has been brought against an indigent defendant in a judicial proceeding. Here, as in those cases, the defendant is indigent because he is incarcerated by the very State that has summoned him into court. And here, as in those cases, the defendant, because of his indigence, has been deprived of an item absolutely crucial for an effective presentation of his case.

At bottom the common property of *Griffin* and the instant case is an abiding, fundamental unfairness. Disparities between private litigants and their resources are an inescapable fact of life and are hardly repugnant to the Constitution. But when "the State with all its resources and power," *Green v. United States,* 355 U.S. 184, 187 (1957), hales into a court a man whom it has rendered indigent by incarceration in a case pregnant with criminal implications and there denies him a readily available laboratory test that has a greater than 90% chance of conclusively proving his innocence, the heavy-handed role that the State is choosing to assume does not rest easily with the requirements of due process. This "suppression by the prosecution of evidence favorable to an accused" may not be accomplished with the same culpability as the suppression in *Brady v. Maryland,*

373 U.S. 83, 87 (1963), but it is no less real. This Court has noted in *Wardius v. Oregon,* 412 U.S. 470, 474 (1973), that "[T]he Due Process Clause. . .does speak to the balance of forces between the accused and his accuser." *See United States v. Ash,* 413 U.S. 300, 309 (1973). In the instant case, that "balance of forces" was egregiously unfair and worked a correspondingly unfair result. It is the historic role of this Court in such cases "to keep the balance true." *Snyder v. Massachusetts,* 291 U.S. 97 (1934).

Sixth. In Connecticut this imbalance of forces is further exacerbated by a unique evidentiary burden placed upon defendants in paternity proceedings. Since the enactment of Connecticut's original bastardy statute in 1672, plaintiffs and defendants in paternity actions have been placed in dramatically unequal positions. The language of the original statute gives some indication of the idiosyncracy that has historically marked this area of the law:

> [T]he man charged by the Woman to be the Father, she holding constant in it (especially being put upon the real discovery of the truth of it in the time of her travel) shall be the reputed Father, and accordingly be liable to the charge of maintenance. . .notwithstanding his denyal; unless the circumstances of the case and pleas be such on the behalf of the man charged, as that the Court. . .shall see reason to acquit him.

The Book of the General Laws for the People within the Jurisdiction of Connecticut 6 (1673).

Bastardy actions, moreover, provided the sole exception to the common law rule that parties to legal actions could not testify on their own behalf. As the Supreme Court of Connecticut later explained:

> [I]n cases of illegitimate children, it was considered so unjust that the mother should bear, not only the suffering and danger attendant upon maternity, but in

> addition the whole expense of supporting her child, when there was another equally in fault, to say the least, in respect to its birth, that an exception was made of suits brought by her for the maintenance of the child, and she was allowed to testify who was its father under certain safeguards provided by the statute.

Booth v. Hart, 43 Conn. 480, 485 (1876). The putative father, on the other hand, was not permitted to testify, *id.* at 486, but was considered protected by the requirement that the mother be examined under oath and put to "discovery in the time of her travail," *Town of Chaplin v. Hartshorne,* 6 Conn. 41, 44 (1825). It was "recognized as a fact, established by human experience, that, at such a time, a woman in her anguish would be apt to speak as to that matter, and to speak the truth." *State v. Sebastian,* 81 Conn. 1, 7, 69 A. 1054, 1056 (1908). If the defendant were to prove himself innocent, he was compelled to do so "by other evidence than his own." *Booth v. Hart, supra,* 43 Conn. at 480.

This review of colonial bastardy law has been necessary because certain of its basic evidentiary anomalies persist in Connecticut to this day. Although 1848 Conn.Pub.Acts. ch. 44 § 1 eliminated the testimonial disqualification of parties, including putative fathers, the Supreme Court of Connecticut compensated for this change by nullifying the statutory requirement that the mother be put to the discovery in the time of her travail. *Booth v. Hart, supra.* Bastardy proceedings thus became swearing contests, but contests in which the defendant was placed at a singular disadvantage. As the Supreme Court of Connecticut explained in *Mosher v. Bennett,* 108 Conn. 671, 674, 144 A. 297, 298 (1929), the mother's constancy of accusation is sufficient to make out a prima facie case. "The prima facie case so made out places upon the reputed father the burden of showing his

innocence of the charge, and under our practice *he must do this by other evidence than his own.*" *Id.* (emphasis added).

Under this rule the instrinsic imbalance present in bastardy proceedings prior to the 1848 qualification statute has been, if anything, exacerbated. The mother need not be "put to the discovery" because the putative father can now testify, but although the putative father may now testify his testimony will do him no good unless he manages to find other evidence to support his defense. His testimony, no matter how credible, is legally insufficient to outweigh the plaintiff's testimony, no matter how incredible, in the pans of justice. This is very much the law in Connecticut today. *See Kelsaw v. Green,* 6 Conn. Cir. Ct. 516, 276 A.2d 909 (App. Div. Cir. Ct. 1971). Given this evidentiary requirement, a blood grouping test is even more important to the defendant that it would otherwise be. This rule not only renders "the balance of forces" in a proceeding agaist an indigent yet more egregiously unfair, but strips a hearing where the defendant has been denied such a test of much of whatever meaning it might have otherwise possessed.

Finally. It is of the utmost importance that the thing at issue in the instant case is not a contract for the delivery of potatoes or the title to a parcel of land or the monetary damages attendant upon an automobile accident but the paternity of a child. This Court has long rejected the Platonic doctrine that the State should control the parent-child relationship according to its own notions of expediency. *See Meyer v. Nebraska,* 262 U.S. 390, 401-02 (1923). "The child is not the mere creature of the State." *Pierce v. Society of Sisters,* 268 U.S. 510, 535 (1925). In this case, however, the State has brought an unwilling defendant and an unrepresented child before its own court system and judicially established a parent-child relationship between

them while abjuring the use of the most probative available evidence to determine whether such a relationship in fact exists. The Court should not countenance this cavalier treatment of the parties involved.

This Court has, in recent years, recognized that both unwed fathers and illegitimate children possess certain substantive rights under the Fourteenth Amendment. *Stanley v. Illinois,* 405 U.S. 645 (1972), established that an unwed father has an "interest. . .in the children he has sired and raised [that] undeniably warrants deference and, absent a powerful countervailing interest, protection." *Id.* at 651. *Cf. Caban v. Mohammed,* 441 U.S. 380 (1979) (invalidating a gender-based statute disabling an unwed father from blocking the adoption of his child).

This case, to be sure, is in many ways the converse of *Caban* and *Stanley.* The fathers in those cases were attempting to assert parental rights, while the appellant here denies that he is, in fact, a parent. But the establishment of a parental relationship, even under these circumstances, not only entails the obvious financial responsibilities that have been thrust upon the putative father but quite possibly a host of other legal, moral, and emotional responsibilities that cannot even be forseen at the present time. The establishment of such a relationship by judicial fiat should thus invoke the same basic protections that would attend the termination of that relationship.

There is, moreover, another interest present in the instant case. The court below not only made Walter Little a parent while depriving him of the crucial evidence necessary to defend that allegation, but it simultaneously made Kenyatta Streater his daughter. The fact that the State has chosen to use its judicial machinery to pronounce this child the daughter of a criminal on less than the best available

evidence is a poignant indication of its cavalier approach to a judicial proceeding that should be characterized by the most painstaking thoroughness.

This is particularly ironic because Congress, in enacting 42 U.S.C. §654 (1976), which compels the States to bring paternity proceedings against the putative fathers of illegitimate AFDC recipients, plaintly intended the States to endeavor to establish the biological relationships involved accurately. The Senate Committee on Finance stated in its report:

> The Committee believes that an AFDC child has a right to have its paternity ascertained in a fair and efficient manner unless identification of the father is clearly against the best interests of the child. Although this may in some cases conflict with what a social worker considers the mother's short term interests, the Committee feels that the child's right to support, inheritance, and to know who his father is deserves the higher social priority.

S. Rep. No. 93-1356, 93d Cong. 2d Sess. 51 (1974), *reprinted in* [1974] U.S. Code Cong. & Ad. News 8133, 8154-55.[30]

This Court has established that children born out of wedlock have some minimal constitutional rights to support, *see Gomez v. Perez,* 409 U.S. 535 (1973), inheritance, *see Trimble v. Gordon,* 430 U.S. 762 (1977), and to a

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[30]Interestingly, when the Senate first considered H.R. 17045, 93d Cong., 2d Sess. (1974), the vehicle by which 42 U.S.C. §654 (1976) was ultimately to be enacted, it amended that bill to establish a national system of laboratories that would provide state courts with blood test evidence. 120 Cong. Rec. 40321 (1974). This amendment was later deleted by a conference committee, H.R. Rep. No. 93-1643, 93d Cong., 2d Sess. 30 (1974), *reprinted in* [1974] U.S. Code Cong. & Ad. News 8161, 8162, possibly because of civil libertarian fears about the intended use of the tests as positive, as well as negative, evidence of paternity.

continuing relationship with their biological fathers, *see Caban v. Mohammed* and *Stanley v. Illinois, supra.* "[T]he child's right to support, inheritance, and to know who his father is" recognized by the Senate Committee on Finance is thus a judicially cognizable interest as well. The Supreme Court of Nebraska has noted that a child's interest in a judicial proceeding "may be adverse to both parents in the case." *Ford v. Ford,* 191 Neb. 548, 549-550, 216 N.W. 2d 176, 177 (1974). The judicial determination of parentage will have "a much deeper impact upon the children as they grow older as to their identity, the procuring of their necessary support from the real father, inheritance rights, and many others." *Id.* at 550, 216 N.W. 2d at 177.

Under these circumstances, it is in the interest of both the putative father and the child in question that, if a parent-child relationship exists, its existence be determined *accurately.* To deprive the parties of an accurate determination of paternity solely because of the poverty of the putative father "needlessly risks running roughshod over the important interests of both parent and child." *Stanley v. Illinois, supra,* 405 U.S. at 657. We respectfully submit that the State of Connecticut has indeed run roughshod over these important interests in the instant case.

The distinguishing characteristics of this case collectively indicate that the Court should give the quality of the hearing afforded appellant a particularly rigorous scrutiny. If, as we have urged, the Due Process Clause *does* speak to the qualitative aspects of the hearings afforded involuntary litigants in cases where family rights are at issue and the balance of forces egregiously unfair, the hearing afforded

appellant in this case must be deemed deficient. The denial of access to a readily available laboratory test, that conclusively excludes more than 90% of all falsely accused men, to the defendant in this case solely because of his proverty rendered the swearing contest in which he was necessarily placed unmeaningful in a constitutional sense.

"[A]bsent a countervailing state interest of overriding significance," this denial of "a meaningful opportunity to be heard" was a denial of due process. *Boddie v. Connecticut,* 401 U.S. 371, 377 (1971). But here, as in *Boddie,* the State's only legitimate countervailing interest is "resource allocation or cost recoupment." *Id.* at 382. That justification was offered and rejected in *Boddie.* It is, if anything, even less convincing in the instant case, where the State is aggressively using its judicial system to gain monetary judgments from indigent defendants. This justification should be rejected. The State is not, under the Due Process Clause, free to deny such overwhelmingly probative evidence to indigent persons, particularly its own indigent prisoners, that it chooses to hale into court.

II. THE DENIAL OF BLOOD GROUPING TESTS TO A DEFENDANT IN A PATERNITY PROCEEDING SOLEY BECAUSE OF HIS INDIGENCY DENIES HIM THE EQUAL PROTECTION OF THE LAWS.

Connecticut's requirement that all defendants in paternity proceedings, irrespective of means, must pay for blood grouping tests in advanceof trial or do without them altogether not only works a palpable injustice on the individual parties in any given proceeding but has a per-

vasive and pernicious effect on the entire system of paternity law. The requirement has ineluctably resulted in a dual system of justice.

Because of the extraordinary frequency with which modern blood grouping tests conclusively exclude falsely accused putative fathers there is, needless to say, no question that nonindigent defendants who dispute their paternity will utilize these tests. In return for the payment of a modest laboratory fee, more than 90% of all innocent nonindigent defendants obtain swift, scientific, and absolutely unimpeachable exonerations. Indigent defendants, on the other hand, are summarily placed in swearing contests in which the pans of justice are loaded against them. These are contests, moreover, in which even the fairest and most conscientious judges can rarely claim to render decisions not open to doubt. There are, consequently, two dramatically different systems of justice: a reliable one for defendants with assets and an unreliable one for the poor. This glaring disparity is inconsistent with the historic requirements of the Equal Protection Clause.

Conn.Gen.Stat. §46b-168(1979) applies on its face to rich and poor alike. But as this Court noted in *Griffin v. Illinois,* 351 U.S. 12, 17 n.11 (1956) (plurality opinion), "[A] law non-discriminatory on its face may be grossly discriminatory in its operation." Here the Connecticut statute worked an invidious discrimination against appellant solely because he was unable to pay the laboratory fee. *See Williams v. Illinois,* 399 U.S. 235, 242 (1970).

This Court observed in *Harper v. Virginia Board of Elections,* 383 U.S. 663, 668 (1966), that "Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored." Economic barriers are particularly disfavored when they impede effective access to the

courts. Thus, in *Griffin v. Illinois, supra,* the Illinois rule requiring all defendants in noncapital criminal cases, whether indigent or not, to purchase a stenographic transcript of the trial proceedings for use on appeal was deemed to "effectively den[y] the poor an adequate appellate review accorded to all who have enough money to pay the costs in advance." *Id.* at 18 (plurality opinion). *Griffin*'s broad holding that "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has," *id.* at 19, is grounded in the requirements of equal protection as well as those of due process. This is similarly the case with *Griffin*'s progeny, discussed at pp. 28-29, *supra.*

In its most celebrated and thorough analysis of the requirements of the Equal Protection Clause *vis-a-vis* discrimination against the indigent, this Court noted the common properties of the *Griffin* line of cases:

> The individuals, or groups of individuals, who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit.

San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 20 (1973). The school financing system at issue in *Rodriguez* was held not to violate traditional concepts of equal protection because it did not discriminate "against a class of definably 'poor' persons." *id.* at 22, and because, in that case, "lack of personal resources has not occasioned an absolute deprivation of the desired benefit," *id.* at 23. The Court acknowledged, however, that a case involving an inflexible tuition fee that some pupils could pay and others could not "would present a far more compelling set of circumstances for judicial assistance." *Id.* at 25 n.60.

In contrast to *Rodriguez,* the instant case presents a classic example of a prohibited discrimination against the poor. The inflexible laboratory fee necessary to obtain a blood test creates two sharply distinguished classes of paternity defendants: those who happen to have the modest personal resources necessary to pay the fee, and those who do not. The putative fathers lacking such resources must, moreover, completely do without the desired scientific evidence, while the nonindigent readily obtain that evidence and, if falsely accused, are overwhelmingly likely to conclusively prove their innocence. And, just as "the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence," in a criminal case, *Griffin v. Illinois, supra,* 351 U.S. at 17-18 (plurality opinion), the putative father's ability to pay for a blood test bears no rational relationship to his paternity or nonpaternity.

We recognize that in *United States v. Kras,* 409 U.S. 434 (1973), and *Ortwein v. Schwab,* 410 U.S. 656 (1973), this Court found that the bankruptcy and appeal filing fees at issue in those cases did not violate the Equal Protection Clause. Those cases involved litigation "in the area of economics and social welfare," *United States v. Kras, supra,* 409 U.S. at 446. Paternity litigation cannot, however, be so described. As is discussed at some length in the due process portion of this Brief, pp. 22-36, *supra,* paternity proceedings are marked by certain characteristics, notably their quasi-criminal nature and their direct impact on family relationships, that readily distinguish them from typical civil proceedings involving issues entirely reducible to monetary terms. A putative father's interest in the accurate determination of his paternity, in particular, should "come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting

economic arrangements." *Kovacs v. Cooper,* 336 U.S. 77, 95 (1949) (Frankfurther, J. concurring). *See Stanley v. Illinois,* 405 U.S. 645, 651 (1972).

Connecticut's draconian blood test rule is, in any event, far more pernicious than the filing fees at issue in *Kras* and *Ortwein.* Its influence is systemic. The litigants in those cases were would-be plaintiffs.[31] If they did not have the necessary funds when they sought to file their claims they could at least hope to litigate those claims at a later date when the necessary funds had been acquired. Moreover, as the Court emphasized, they had at least some alternatives to the judicial remedy. *Ortwein, supra,* 410 U.S. at 659. But putative fathers are, by definition, *defendants.* They cannot wait for more prosperous days to litigate their claims. Rather, they must appear in court at a date certain, with or without the necessary evidence. It is because of this inescapable fact that Connecticut has created a dramatic and unconscionable disparity between classes of involuntary litigants. Nonindigent putative fathers can purchase reliable, scientific justice; indigent ones cannot. In the words of Justice Black, writing for the plurality in *Griffin v. Illinois,* "Such a denial is a misfit in a country dedicated to affording equal justice to all." 351 U.S. at 19. Justice Frankfurter may, however, be permitted the final observation:

> To sanction such a ruthless consequence, inevitably resulting from a monetary hurdle erected by a State, would justify a latter-day Anatole France to add one more item to his ironic comments on the "majestic equality" of the law. "The law, in its majestic equality, forbids the rich as well as the poor to sleep under

[31]Although the welfare recipients in Ortwein were technically appellants, they were seeking an initial judicial review of their welfare claims in the Oregon Court of Appeals, and were thus plaintiffs in effect. *Ortwein v. Schwab,* 410 U.S. 656, 658 (1973).

> bridges, to beg in the streets, and to steal bread." (John Cournos, A Modern Plutarch, p. 27.)
>
> The State is not free to produce such a squalid discrimination.

Griffin v. Illinois, supra, 351 U.S. at 23-24 (Frankfurter, J. concurring).

CONCLUSION

Conn.Gen.Stat. §46b-168 (1979), violates the Due Process and Equal Protection Clauses of the Fourteenth Amendments. The judgment of the Appellate Session of the Superior Court of Connecticut should therefore be reversed.

Respectfully submitted,

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No. 79-6779

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WALTER LITTLE,

Appellant,

v.

GLORIA STREATER,

Appellee

ON APPEAL FROM THE APPELLATE SESSION
OF THE SUPERIOR COURT OF CONNECTICUT

BRIEF FOR APPELLEE

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QUESTION PRESENTED

Conn. Gen. Stat. Section 46b-168 (1979) provides that the costs of blood grouping tests in paternity actions shall be paid by the party requesting the tests.

1. Does Conn. Gen. Stat. Section 46b-168 (1979) violate the Due Process and Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States as it is applied to indigent defendants?

PARTIES TO THE PROCEEDINGS

(1) *Walter Little*, the appellant, was the defendant in the proceedings below.

(2) *Gloria Streater*, the appellee, was the plaintiff in the proceedings below.

(3) *Carl R. Ajello*, the Attorney General of the State of Connecticut, is a party to this proceeding pursuant to Conn. Gen. Stat. Section 46b-160 (1979).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL QUESTION AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. THE DENIAL OF THE PAYMENT OF THE COSTS OF BLOOD GROUPING TESTS REQUESTED BY AN INDIGENT DEFENDANT IN A PATERNITY CASE DOES NOT VIOLATE THE DUE PROCESS CLAUSE	6
A. The Petitioner has been afforded a meaningful opportunity to be heard	6
B. A Connecticut paternity proceeding is a civil action	13
C. The laws of other state jurisdictions are irrelevant with respect to the Connecticut blood grouping tests statute	17
II. THE DENIAL OF THE PAYMENT OF COSTS OF BLOOD GROUPING TESTS REQUESTED BY AN INDIGENT DEFENDANT IN A PATERNITY CASE DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE	20
A. The Connecticut blood grouping tests statute has a rational basis	20
CONCLUSION	25

TABLE OF AUTHORITIES

Cases *Page*

Armstrong v. Mango.
380 U.S. 545 (1965) 7

Boddie v. Connecticut.
401 U.S. 371 (1971) 7,8,9,10

Brown v. Board of Education.
347 U.S. 483 (1954) 20

Cafeteria Works v. McElroy.
367 U.S. 886 (1961) 7

Covey v. Town of Somers.
351 U.S. 141 (1956) 12

Dandridge v. Williams.
397 U.S. 471 (1970) 20,23

Dunn v. Blumstein.
405 U.S. 330 (1972) 22

Ferro v. Morgan.
35 Conn. Supp. 679, 460 A.2d 873, cert. denied, 177 Conn. 753, 399 A.2d 526 (1979) 4

Goldberg v. Kelly.
397 U.S. 254 (1970) 7

Gomez v. Perez.
409 U.S. 535 (1973) 20

Graham v. Richardson.
403 U.S. 365 (1971) 20,22

Grompers v. Bucks Stove & Range Co.,
221 U.S. 428 (1911) 15

Kusper v. Pontikes.
414 U.S. 51 (1973) 22

Lindsly v. National Carbonic Gas Co.,
220 U.S. 61 (1911) 23

Lockport v. Citizens Community Actions,
430 U.S. 259 (1977) 20

Loving v. Virginia,
388 U.S. 1 (1967) 22

Madden v. Kentucky,
309 U.S. 83 (1940) 18

Massachusetts Board of Retirement v. Murgia,
427 U.S. 307 (1976) 20

Mathews v. Eldridge,
424 U.S. 319 (1976) 8,11

McGowan v. Maryland,
366 U.S. 420 (1961) 23

McKiever v. Pennsylvania,
403 U.S. 528 (1971) 13

McLaughlin v. Florida,
397 U.S. 184 (1970) 20

Memorial Hospital v. Maricopa County,
415 U.S. 250 (1974) 22

Mullane v. Central Hanover Bank,
339 U.S. 306 (1950) 7,12

New York City Transit Authority v. Beager,
440 U.S. 568 (1979) 20

Ortwein v. Schwab,
410 U.S. 656 (1973) 5,7,23

Oyama v. California,
332 U.S. 633 (1948) 20

Parham v. Hughes,
441 U.S. 349 (1979) 21

Pelak v. Korpa,
20 Conn. Supp. 346 (1957) 10

Penfield v. S.E.C.,
330 U.S. 585 (1946) 15

Reed v. Reed,
404 U.S. 71 (1971) 20

Robertson v. Apuzzo, 4,6,13,17
170 Conn. 367, cert. denied, 429 U.S. 852 (1976) .. 22,23

San Antonio Independent School Dist. v. Rodriquez,
411 U.S. 1 (1973) 22

Shapiro v. Thompson,
394 U.S. 618 (1969) 22

Shillitani v. U.S.,
384 U.S. 364 (1966) 15

Stanley v. Illinois,
405 U.S. 645 (1972) 7

Streater v. Little,
No. 806 (App. Sess. Conn. Superior Ct., Feb. 29, 1980),
cert. denied, 180 Conn. 756, 414 A.2d 199 (1980) ... 1

Vance v. Bradley,
440 U.S. 93 (1973) 20,21

U.S. v. Kras,
409 U.S. 434 (1973) 5,7,13,23

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV 2

STATUTES

Conn. Gen. Stat. Section 46b-168 (1979) 2,6
Conn. Gen. Stat. Section 46b-171 (1979) 14,15
Conn. Gen. Stat. Section 53-304(a) (1979) 15
Conn. Gen. Stat. Section 46b-160 (1979) i

IN THE

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OCTOBER TERM, 1980

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WALTER LITTLE,

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ON APPEAL FROM THE APPELLATE SESSION
OF THE SUPERIOR COURT OF CONNECTICUT

BRIEF FOR APPELLEE

OPINIONS BELOW

The opinion of the Appellate Session of the Superior Court of Connecticut (J.A. 25) is unreported. The order of the Supreme Court of Connecticut denying certification is reported at 180 Conn. 756, 414 A.2d 199 (1980). No opinions were filed by the Superior Court of Connecticut at the trial level.

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. Section 1257 (2) (1976), the validity of Conn. Gen. Stat. Section 46b-168 (1979) having been drawn into question on the ground of its being repugnant to the Constitution of the United States as applied in this case and the decision of the Appellate Session of the Superior Court of Connecticut being in favor of its validity.

The judgment of the Appellate Session of the Superior Court of Connecticut was entered on April 1, 1980. A Notice of Appeal to this Court, a copy of which appears at p. 4a of the Appendix to the Appellant's Jurisdictional Statement, was duly filed in the Appellate Session of the Superior Court on June 3, 1980. The case was docketed in this Court and a Jurisdictional Statement filed on June 16, 1980. This Court noted probable jurisdiction on October 6, 1980. (J.A. 27).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process and Equal Protection Clauses of Section 1 of the Fourteenth Amendment to the Constitution of the United States. That section provides, in relevant part, that:

> [N]or shall any State deprive any person of life liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves Conn. Gen. Stat. Section 46b-168 (1979). That statute provides that:

> In any proceeding in which a question of paternity is an issue, the court, on motion of any party, may order the mother, her child and the putative father or the husband of the mother to

submit to one or more blood grouping tests, to be made by a qualified physician or other qualified person, designated by the court, to determine whether or not the putative father or the husband of the mother can be excluded as being the father of the child. The results of such tests shall be admissible in evidence only in cases where such results establish definite exclusion of the putative father or such husband as such father. The costs of making such tests shall be chargeable against the party making the motion.

STATEMENT OF THE CASE

On May 21, 1975, Gloria Streater, the Appellee, gave birth to a female child, Kenya Chantel Streater.

On July 11, 1977, the defendant instituted a paternity action in which she named the appellant, Walter Little, to be the father of her minor child, Kenyatta Chantel Streater.

The appellant moved that the respondent, her minor child, and himself be ordered to submit to blood grouping tests.

The appellant further moved that the costs of the requested blood grouping tests should be paid by the State of Connecticut due to his indigency.

The appellant's motion for blood grouping tests was granted by the trial court. However, his request that the State of Connecticut bear the expense of the tests was denied.

On October 4, 1978, after a full hearing in which the appellant participated with the aid of legal counsel, Walter Little was adjudged to be the father of Gloria Streater's minor child, Kenyatta Chantel Streater.

The Petitioner appealed the trial court's denial of his request that the State of Connecticut bear the financial

burden of blood grouping tests to the Appellate Session of the Superior Court of Connecticut.

On February 29, 1980, the Appellate Session of the Superior Court of Connecticut affirmed the trial court's ruling by finding that the Petitioner's appeal was controlled by the holding of *Ferro v. Morgan*, 177 Conn. 753, 399 A.2d 526 (1979), which held that Conn. Gen. Stat. Section 46b-168 (1979) violates neither the Due Process nor Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

The Petitioner then filed for certification of the present issue to the Supreme Court of Connecticut which denied Walter Little's petition on April 1, 1980.

SUMMARY OF ARGUMENT

The Petitioner, Walter Little, was an indigent defendant in a paternity action instituted in the State of Connecticut. During the course of the proceedings below the petitioner requested that the respondent, her minor child and himself be ordered to submit to blood grouping tests at the expense of the State of Connecticut. Conn. Gen. Stat. Section 46b-168 provides that the costs of such tests will be borne by the party requesting them.

Conn. Gen. Stat. Section 46b-168 does not violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The Connecticut Supreme Court in the case of *Robinson v. Apuzzo* held that paternity actions in Connecticut are civil actions and are not criminal or quasi-criminal in nature. The petitioner has been accorded the due process any other civil litigant should be extended in the fact he has been given a meaningful opportunity to be heard. The petitioner's defense was made with the aid of legal counsel, he was able to explore through pretrial discovery, and he was able to cross examine the respondent and present witnesses on his own behalf.

The State of Connecticut in administering its judicial system may impose certain fees and assess certain costs which do not deny a party access to the judicial process. *U.S. v. Kras*, 409 U.S. 434; *Ortwein v. Schwab*, 410 U.S. 656. The trial court's refusal to order the State of Connecticut to assume the costs of the petitioner's blood grouping tests pursuant to Conn. Gen. Stat. Section 46b-168 did not deny the petitioner the opportunity to be meaningfully heard.

The State of Connecticut like all other states must administer its courts within certain budgetary restraints. The State should not be made to subsidize the means through which the defendant in a civil litigation obtains possible evidence for his defense as a paternity defendant's liberty is not at stake.

Conn. Gen. Stat. 46b-168 does not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. State laws are presumed to be valid under the equal protection clause as long as there is a rational basis for the legislative enactment.

The costs provision section of the blood grouping test statute does not deprive a defendant in a paternity action of a fundamental right nor create a suspect classification which would warrant the Court's strict scrutiny to find whether the law in question is buttressed by some compelling state interest. The right to obtain potential evidence in a civil litigation is not a fundamental right and indigency does not create a suspect classification.

Conn. Gen. Stat. Section 46b-168 is rationally based on the Connecticut legislature's desire to have civil litigants bear the costs of litigation which involves them and not to pass the costs on to those who have no interest in it.

Therefore, as Conn. Gen. Stat. Section 46b-168 does possess the necessary rational basis, it complies with the Equal Protection Clause of the United States Constitution.

ARGUMENT

I. THE DENIAL OF THE PAYMENT OF THE COSTS OF BLOOD GROUPING TESTS REQUESTED BY AN INDIGENT DEFENDANT IN A PATERNITY CASE DOES NOT VIOLATE THE DUE PROCESS CLAUSE.

A. The petitioner has been afforded a meaningful opportunity to be heard.

The Petitioner has called into question the constitutionality of Conn. Gen. Stat. Section 46b-168 (1979).[1] Specifically, he claims that the provision of the statute which reads:

> "The costs of making such tests shall be chargeable against the party making the motion."

violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

The Petitioner continually errs by attempting to cloak paternity actions in the State of Connecticut with the same safeguards afforded criminal proceedings.

The Connecticut Supreme Court, in the case of *Robertson v. Apuzzo*, 170 Conn. 367 (1976) dispelled any notion that paternity actions in Connecticut may be considered criminal or quasi-criminal proceedings by holding that paternity actions are clearly civil in all aspects. In *Robertson*, the Connecticut Supreme Court held that an indigent defendant in a paternity action is not denied

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[1]The original denial of Walter Little's request that the State pay the costs of the requested blood tests was made pursuant to Conn. Gen. Stat. Section 52-184 which was transferred to Conn. Gen. Stat. Section 46b-168 by the 1979 revision of the Connecticut General Statutes.

constitutional due process when he was denied a jury trial because of his inability to pay the statutory fee.

This Court has stated that in determining whether in any particular case due process protection should be afforded one must begin with a determination of the precise nature of the governmantal function involved as well as the private interest that has been affected by governmental action. *Stanley v. Illinois*, 405 U.S. 645, 651, *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895. The governmental function involved in the present case is the maintenance of an orderly regulation of its court system by means of requiring that certain costs be borne by the litigants themselves.

The petitioner depicts a situation in which his right to a meaningful hearing has been extinguished by the statutory provision requiring him to pay the costs of a blood grouping test. The extent to which due process will be afforded is affected by the extent to which the claimant has gained or lost some fundamental interest. *Goldberg v. Kelly*, 397 U.S. 254, 263, *Ortwein v. Schwab*, 410 U.S. 656, 659, *U.S. v. Kras*, 409 U.S. 434.

This Court in *Boddie v. Connecticut*, 401 U.S. 371, set forth the requirements of due process which are mandated by the Fourteenth Amendment to the United States Constitution in stating:

> What the Constitution does require is an opportunity . . . granted at a meaningful time and in a meaningful manner, "*Armstrong v. Mango*, 380 U.S. 545, 552, 14 L.Ed. 2d 62, 85 S. Ct. 1187 (1965) (emphasis added), for [a] hearing appropriate to the nature of the case." *Mallane v. Central Hanover Tr. Co.*, supra, at 313, 94 L.Ed. at 873. The formality and procedural requisition for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceeding. 28 L.Ed. 2d at 118.

The petitioner argues that his inability to present evidence of blood grouping tests in his defense due to his lack of funds to procure them deprives him of a meaningful opportunity to be heard. This Court, in *Boddie*, however, refused to mandate any particular form of hearing, stating that the "formality and procedural requisites can vary depending upon the importance of the interests involved and the nature of the subsequent proceeding." *Boddie v. Connecticut*, supra.

This Court in *Mathews v. Eldridge*, 424 U.S. 319, 335, enumerated three considerations which must be analyzed in identifying the due process requirements applicable to a particular situation. The Court stated:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burden that the additional or substitute procedural requirement would entail.

Taking these criteria and applying them to the instant case yields the following three relevant factors. First, the interest of the petitioner in defending the paternity action; second, the risk that without a waiver of blood grouping tests the petitioner will be deprived of his ability to defend the action and the probable value to his defense if such a waiver is allowed; and third, the State's interest in obtaining judicial determinations of paternity and the burden that the waiver of the costs of blood tests would put on the State's fiscal resources.

Obviously, a defendant does possess a strong interest in providing the best defense he can in any civil action.

The petitioner here, however, portrays a situation in which without the availability of blood grouping tests he is deprived of an opportunity to make a meaningful defense. This is not an accurate portrayal of the situation. The petitioner is represented by counsel. He has the ability to call witnesses on his behalf. He has the ability to cross examine his accuser. Finally, he has the ability to use pretrial discovery techniques such as interrogatories with which to prepare his defense.

The petitioner maintains that due to the increased reliability of the blood grouping tests to exclude putative fathers unjustly charged, his opportunity for a meaningful hearing is precluded without the tests. The fact is that the results of blood grouping tests are not always conclusive of the issue before the Court in a paternity case. The mere taking of the tests without cost to the petitioner is no more reliable than any other evidence which he might produce. Because the tests cannot be extended to produce a conclusive result in all cases, the failure of the State of Connecticut to pay the costs of blood grouping tests do not place these tests in such a category that without them the petitioner has been denied a meaningful opportunity to be heard and due process protections are lacking.

The taking of the blood grouping tests may result in no benefit to a defendant in defending a paternity action if the results are inconclusive or inclusive. The ability to have blood tests is therefore only a means of procuring evidence which may or may not be beneficial to the defense of a paternity action. What the petitioner is seeking is to have the State of Connecticut subsidize his defense. The due process requirements as outlined in *Boddie v. Connecticut*, 401 U.S. 371, do not require that the defendant be given free access to the means of potential evidence.

This Court in *Boddie* pointed out that a "State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the premise of the Due Process

Clause, "but within limits of practicability."

Blood grouping tests are not the only means by which a putative father may provide a defense in a paternity case. The petitioner's inability to pay for blood grouping tests does not prevent him from producing evidence of other factors which may be relevant in defending a paternity claim. Should a blood grouping test prove inclusive the plaintiff may be able to produce evidence which is more probative than an inconclusive test. In *Boddie*, the State held exclusive control of the methods of proof in divorce actions. In a paternity action, this type of exclusivity is not confined to the State. The denial of payment for a blood grouping test may deny the petitioner access to a source of potential evidence but it does not leave him without any recourse in putting forth a defense.

In Connecticut, paternity actions are maintained for the benefit of the mother and child to protect the State from the burden of the child's support. *Pelak v. Korpa*, 20 Conn. Supp. 346, 349 (1957). To impose upon that function the burden that the State must also subsidize an accused father's defense would unduly burden the State's fiscal resources.

Due to his indigency the petitioner may have been denied access to a tool to use in establishing evidence of his defense. This does not serve to deny him access to the judicial process as was done in *Boddie*. The petitioner can cite no constitutional guarantee which provides for access to the means of possibly producing his most effective defense in this civil action. The petitioner has not been denied a meaningful opportunity to be heard just because he cannot afford to present every possible type of evidence in his defense.

The State of Connecticut is not an entity with unlimited monetary reserves. The fiscal effects of requiring the State of Connecticut to bear the costs of blood grouping tests when a defendant in a paternity litigation is unable to, would have a substantial effect on the State's

general revenue fund. The State of Connecticut should not be required to provide a civil litigant with a defense. In the case of *Mathews v. Eldridge*, 424 U.S. 319, this Court was confronted with the problem of whether or not an evidentiary hearing must be held in all cases before Social Security Disability benefits are terminated. In discussing the fiscal impact of such a requirement, this Court stated at 348:

> "At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the costs. Significantly, the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited."

Although the factual circumstances of *Mathews* differs from the instant case, the Court's philosophy is quite relevant. Should the State of Connecticut, which must attempt to live within certain budgetary restraints, be required to bear the burden of financing the costs of blood grouping tests, which may or may not be of any probative value in the defense of a paternity action, then its ability to provide for needs of those who depend upon it for their sustenance will be lessened.

The legislature of the State of Connecticut has provided that the party requesting a blood grouping test must bear the costs. If the Connecticut legislature felt it could afford to provide the means for such a test to indigents, it would have done so. The legislature of Connecticut acted wisely in refusing to place the costs of blood grouping tests on its shoulders. If the State of Connecticut were to assume the costs of blood grouping tests, would not it have to bear the costs of any other evidentiary tool an

indigent might desire to use in his defense in a paternity action? For example, consider a situation in which an indigent defendant in a paternity action seeks to base his defense upon the results of blood grouping tests. The tests are given at the State's expense, however, the results are inconclusive. The defendant now shifts his defense to the claim that his accuser had sexual relations with another man near the time of conception of the child whose paternity is in question. If the defendant wished to take the other man's deposition, should the State be made to bear the cost? If the other man lived outside of Connecticut, should the State be made to pay the expense of bringing that man before the court for examination? Should the State be made to provide the defendant in a paternity action with expert witnesses? In sum, the State should not be made to bear the costs of providing a defense for any civil litigant. To begin assuming the costs of blood grouping tests would open the door to placing the State in the position of bearing the costs of all types of defenses in all types of civil litigation involving indigent defendants. Certainly this would place enormous pressure on State budgets which are already straining to remain in the black.

The equivalence of the opportunity for indigents to make a defense cannot be done at the State's expense. The opportunity to be meaningfully heard must be tempered by the caveat that such opportunity must be within limits of practicability. *Mallane v. Central Hanover Tr. Co.*, 339 U.S. 306, 317-319 (1950); *Covey v. Town of Somers*, 351 U.S. 141 (1956).

The State of Connecticut has met the mandate of the Due Process Clause by providing to a defendant in a paternity action a meaningful opportunity to be heard. That opportunity is presented to the petitioner through the rules applicable to civil actions. A defendant in a paternity action has available to him the rules of pre-trial discovery and a full trial on the issue of paternity in which he may present all evidence relevant and material to his defense.

The Due Process Clause does not require the State to assist indigent defendants in their defense in any civil action.

This Court in *United States v. Kras*, 409 U.S. 434, (1973), specifically pointed out that Boddie "obviously stopped short of an unlimited rule that an indigent at all times and in all cases has the right to relief without payment of fees."

B. A Connecticut paternity proceeding is a civil action.

The plaintiff takes great pains in attempting to interject criminal or quasi-criminal overtones into paternity actions in the State of Connecticut. The nature of a paternity action was dealt with in great detail in the case of *Robertson v. Apuzzo*, 170 conn. 367, cert. denied, 429 U.S. 852 (1976). That case involved the question of whether an indigent defendant in a Connecticut paternity action is entitled to a jury trial without the payment of the statutory fee required of every party to a civil action who desired a trial by jury rather than by a court. The Connecticut Supreme Court answered in the negative.

After making a comprehensive examination of the one hundred and fifty year history of paternity actions in the State of Connecticut, the Connecticut Supreme Court concluded that paternity actions are unequivocally civil in nature. The Court examined every element constituting a paternity action in the State of Connecticut and found the sole purpose of a paternity action to be 'the maintenance of the bastard in aid of the mother.' The critical analysis made by the Connecticut Supreme Court takes paternity actions out of the realm of those cases which civil versus criminal has been determined through a "wooden approach" as discussed in *McKiever v. Pennsylvania*, 403 U.S. 528, 541 (1971). With respect to paternity actions in Connecticut, the term "civil" is more than just a label.

The petitioner, nevertheless, attempts to raise Due Process safeguards accorded indigents in criminal proceedings to cover himself as an indigent defendant in a civil paternity action. Instead of looking at the nature of the action itself, he fashions his claims out of the consequences of non-compliance with the court's orders. The petitioner attempts to build the theme that when an adjudicated father fails to carry out the court's orders, the imprisonment, inter alia, which may be brought about by contempt is punishment imposed by the legislature, which punishment if it does not constitute criminal punishment, at least parallels criminal punishment. This theme, however, ignores the purpose of contempt proceedings under Conn. Gen. Stat. Section 46b-171 (1979).[2]

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[2]Sec. 46b-171. (Formerly Sec. 52-442). Judgment and order of Court. If the defendant is found guilty, the court shall order him to stand charged with the support and maintenance of such child, with the assistance of the mother if she is financially able, and to pay a certain sum weekly until the child attains the age of eighteen years; and the court shall ascertain the expense of lying-in and of support and maintenance of the child until the time of rendering judgment, and order him to pay the amount thereof to the complainant, or, if a town or the state has paid such expense, to the town or the state, as the case may be, and shall grant execution for the same and costs of suit taxed as in other civil actions, together with a reasonable attorney's fee; and may require him to become bound with sufficient surety to perform such orders for support and maintenance and the expense of lying-in and to indemnify the state or the town chargeable with the support of such child from any expense for its maintenance. If he fails to comply with any such order, the court may commit him to a community correctional center, there to remain until he complies therewith; but, if it appears that the mother does not apply the weekly allowance paid by him toward the support of such child, and that such child is chargeable, or likely to become chargeable, to the town where it belongs, the court, on application, may discontinue such allowance to the mother, and may direct it to be paid to the selectmen of such town, for such support, and may issue execution in their favor for the same. The provisions of section 17-323a shall apply to this section. The clerk of the court which has rendered judgment for the payment of money for the maintenance of any child under the provisions of this

To understand the purpose of contempt under Conn. Gen. Stat. Section 46b-171 the question must be asked, ". . . what does the court primarily seek to accomplish by imposing sentence?" *Shillitani v. U.S.*, 384 U.S. 364, 370 (1965).[3] Insofar as Section 46b-171 is concerned, the purpose of imposing sentence by way of contempt is to coerce the contemnor to carry out what he refused to do, 'the maintenance of the bastard in aid of the mother.' The contempt proceedings under Section 46b-171 are designed to operate in a prospective manner. They are entirely consistent with the purpose of the paternity action and, from any realistic point of view, such contempt proceedings are remedial in purpose.

Although all contempts ". . . are neither wholly civil nor altogether criminal . . ." *Grompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1910), and "[w]hile any imprisonment, of course, has punitive and deterent effects . . . ." *Shillitani v. U.S.*, supra, where there is the imprisonment of a contemnor which is intended to be remedial by the means of coercion, rather than intended to inflict punishment, the remedy is said to one for civil contempt. *Penfield Co. v. S.E.C.*, 330 U.S. 585, 590

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section shall, within twenty-four hours after such judgment has been rendered, notify the selectmen of the town where the child belongs. Any order for the payment of support for any such child may at any time thereafter be set aside or altered by any court issuing such order. Failure of the defendant to obey any order for support made hereunder may be punished as for contempt of court and the costs of commitment of any person imprisoned therefor shall be paid by the state as in criminal cases.

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[3]The appellant cites Conn. Gen. Stat. Section 53-304(a) as giving the court the power to imprison for the failure to comply with the court's monetary orders for support. In fact, almost all contempts for the non payment of support orders arising from paternity adjudications are brought pursuant to Conn. Gen. Stat. Section 46b-171 (1979).

(1946). The petitioner has never been able to point to any part of the instant case which would show that any punishment by reason of the contempt is intended as a deterrent to offenses against the public and does not serve only the purposes of the complainant. Id.

While the 'impact' or 'effect' of punishment upon a person is always an important consideration in any case, in the present case, they can rise no higher in importance than the obligation of an adjudicated father's obligation to support his child. Even though the impact or effect of punishment is ever present under Section 46b-171, ending the contempt at any time, and even preventing the contempt in the first place is always within the exclusive control of the contemnor. It is he alone that determines the degree of impact or effect of punishment on himself and not the State.

In the last analysis, plaintiff's argument has as its basis the uncoupling of the function of the contempt proceedings from the purpose of the paternity action. To view possible contempt proceedings as if the purpose of the paternity action never existed would be meaningless and fails to advance the cause of law. To accept, the petitioner's argument that the provisions of Connecticut law for accomplishing execution of the court's money judgment and for contempt proceedings for failure to comply with the orders of the court converts the petitioner's cause of action from a civil to a criminal one is tantamount to saying that the provisions of 46b-171 exist but without a role to play in the paternity laws of Connecticut.

Finally, it must also be noted that any prospective possibility of the loss of one freedom caused by the failure to comply with monetary orders entered in a paternity case would have to arise only from a wilful refusal to pay

and never from an inability to do so because of indigency.[4] A defendant in a contempt proceeding has a right to counsel and is afforded a meaningful opportunity to be heard. He has every opportunity within the rules of practice to make his defense and show why he should not be held in contempt.

C. The laws of other state jurisdictions are irrelevant with respect to the Connecticut blood grouping test statute.

The plaintiff attempts to depict the state of the law in Connecticut with regard to blood grouping tests as an aberration in this field.

An examination of the statutory and case law throughout the jurisdictions of this country reveals a different picture. There are nineteen states and the District of Columbia which provide by statute for the payment of blood grouping tests by various public entities, i.e., state, county, municipal. Most of these jurisdictions also view paternity actions as criminal proceedings. In Connecticut, such is not the case, *Robinson v. Apuzzo*, 170 Conn. 367, 372 (1976). The remaining thirty-one states make no specific provision for providing an indigent defendant with a blood grouping test at no cost to him. Some states do all allow a trial judge a degree of discretion in determining who will pay for the tests. Other states make no mention of who is to bear the costs of the tests.

The fact that blood grouping tests may be available to indigents in paternity actions in many states does not make it a constitutional mandate that the State of Connecticut also must bear the same expense. This Court has

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[4]In the present action, Walter Little was ordered to pay $1.00 per month as current support and $1.00 per month toward an arrearage amount of $6,974.48 (J.A. 20).

noted that sovereignty of the states in the case of *Madden v. Kentucky*, 309 U.S. 83, 93 when it stated:

> "In the states, there reposes the sovereignty to manage their affairs except only as the requirements of the Constitution otherwise provide."

The State of Connecticut provides an indigent defendant in a paternity case with the opportunity to have legal counsel, to perform pretrial discovery, cross examine witnesses and to avail himself of the appellate process. The requisites for a meaningful opportunity to be heard for an indigent defendant in a paternity case is met by the paternity legislation of Connecticut.

The petitioner also attempts to extend heretofore unknown due process protections for civil litigants to himself by labeling himself an involuntary litigant and on one occasion, just because he is a defendant. Speaking practically, the majority of all defendants in civil actions are involuntary litigants. No one would suggest, however, that all involuntary litigants in civil actions may have a state pay for their defense. Certainly such a situation would involve costs of a fantastic nature.

The petitioner claims the factors of involuntariness potential criminal sanctions, state action, and his incarceration should invoke Due Process protection by compelling the State to pay the costs of his blood grouping tests. All of the cases cited by the plaintiff in support of this position are criminal in nature or are connected with the criminal justice system. The plaintiff may have been incarcerated at the time during which the issue of paternity was being litigated, but this fact should not extend additional due process protections to this civil litigation. The cases cited by the petitioner all involve situations in which someone's freedom was at issue in some manner. As noted above, the freedom of a defendant in a paternity action in Connecticut is no way at issue, therefore, negating the due process benefits the petitioner

seeks in this civil litigation.

The plaintiff also contends that the State should bear the costs of blood grouping tests because of the special status he awards this type of litigation. He wishes to avoid a swearing contest in which a desperate judge attempts to find the truth. A paternity case should not be awarded a special status. The trial of paternity does not differ from any other civil litigation in that the judge hears the witnesses and within his discretion gives whatever weight he deems warranted to the testimony of those involved. The search for the truth in a paternity action is not of such a nature that a state is constitutionally required to pay for an indigent's defense.

ARGUMENT

II. THE DENIAL OF THE PAYMENT OF COSTS OF BLOOD GROUPING TESTS REQUESTED BY AN INDIGENT DEFENDANT IN A PATERNITY CASE DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

A. The Connecticut blood grouping tests statute has a rational basis.

State laws are generally entitled to a presumption of validity against attack under the Equal Protection Clause. *Lockport v. Citizens for Community Actions*, 430 U.S. 259, 272. State legislatures have wide discretion in passing laws that have the inevitable effect of treating some people differently from others, and legislative classifications are valid unless they bear no rational relationship to a permissible state objective. *New York City Transit Authority v. Beager*, 440 U.S. 568, *Vance v. Bradley*, 440 U.S. 93, *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 314; *Dandridge v. Williams*, 397 U.S. 471, 485.

Not all legislation, however, is entitled to the same presumption of validity. The presumption is not present when a state has enacted legislation whose purpose or effect is to create classes based upon racial criteria, since racial classifications in a constitutional sense are inherently "suspect." *McLaughlin v. Florida*, 397 U.S. 184, *Brown v. Board of Education*, 347 U.S. 483. And the presumption of statutory validity may also be undermined when a state has enacted legislation creating classes based upon certain other immutable human attributes, See e.g. *Oyama v. California*, 332 U.S. 633 (national origin), *Graham v. Richardson*, 403 U.S. 365 (alienage), *Gomez v. Perez*, 409 U.S. 535 (illegitimacy), *Reed v. Reed*, 404 U.S. 71 (gender). The plaintiff's indigency is not one of those

attributes which mandate equal protection scrutiny.

In the absence of invidious discrimination, however, a court is not free under the aegis of the Equal Protection Clause to substitute its judgment for the will of the people of a state as expressed in the laws passed by their popularly elected legislatures. "The Constitution presumes that absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted. *Vance v. Bradley*, 440 U.S. at 97. This is not meant to infer that the provision of Conn. Gen. Stat. 46b-168 (1979) now being attacked is anything but sage legislation, however, it is mentioned to show that the petitioner and those similarly situated have the ability to make their requests known to the state legislature and seek new legislation to provide for their need.

This Court stated in the case of *Parham v. Hughes*, 441 U.S. 349, 352 (1978):

> If the statute is not invidiously discriminatory, it is entitled to a presumption of validity and will be upheld "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislatures actions were irrational."

Certainly, the intention of a legislature to have its civil litigants bear the costs of their own defense is not an irrational one but rather one imbued with economic responsibility.

In determining whether a statute violates the Equal Protection Clause of the United States Constitution, this court has normally invoked a strict scrutiny test or a rational basis test depending upon the type of rights involved.

The strict scrutiny test is applied when a party is denied equal protection of a law in the form of the denial of

a fundamental right. Fundamental rights deserving strict scrutiny are of the nature of the right to vote, *Dunn v. Blumstein*, 405 U.S. 330, the right of an indigent to medical care, *Memorial Hospital v. Maricopa County*, 415 U.S. 250, the right to interstate travel, *Shapiro v. Thompson*, 394 U.S. 618, freedom of association, *Kusper v. Pontikes*, 414 U.S. 51. Strict scrutiny may also be applied if the legislation in question creates a suspect classification based on race, *Loving v. Virginia*, 388 U.S. 1, or upon alienage or national origin, *Graham v. Richardson*, 403 U.S. 365.

The right of an indigent defendant in a paternity action to have the costs of blood grouping tests which may be used in his defense provided by the State is not one of those fundamental rights which warrants strict scrutinization by this Court. The Connecticut Supreme Court in the case of *Robertson v. Apuzzo*, 170 Conn. 367, has said that paternity legislation designed to provide for the support and maintenance of the child is in the area of economics and social welfare.

Indigency in civil litigation is not one of those suspect classifications demanding the strict scrutiny of this Court. This court has held that wealth discrimination alone is not sufficient for invoking strict scrutiny. *San Antonio Independent School District, et al v. Demetris P. Rodriquez, et al*, 411 U.S. 1, 29.

The strict scrutiny test should not be applied because the ability to have blood grouping tests performed is not a fundamental right. This is true, since as discussed earlier, due process does not require that a defendant in a paternity action be given free access to the means of discovering potentially probative evidence. The State should not be made to justify the legislation in question by showing some compelling state interest as the basis of the legislative enactment.

The petitioner's rights to a blood grouping test is of no greater constitutional significance than the right to a dis-

charge in bankruptcy. This Court addressed the question of the fundamentality of such rights in *U.S. v. Kras*, 409 U.S. 434, 446, by stating:

> "[t]he right to a discharge in bankruptcy is not a fundemental right demanding a compelling governmental interest as a precondition to regulation and there is a rational basis for the fee requirement."

In the case of *Ortwein v. Schwab*, 410 U.S. 656, 660, the Court dealt with equal protection claims in this manner:

> ". . . Nor is the filing fee requirement violative of equal protection, since the applicable standard in the area of social and economic regulation when a suspect classification is not present is rational justification and here the requirement of rationality is met."

The proper standard of review is by means of the rational basis test. As stated above in *Robertson v. Apuzzo*, 170 Conn. 367, Connecticut Supreme Court has termed paternity legislation to fall in the area of economic and social welfare legislation. This Court spoke to this field of legislation in the case of *Dandridge v. Williams*, 397 U.S. 471, 486 when it stated:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some reasonable basis it does not offend the Constitution simply because the classification is not made with the mathematical nicety or in practice results in some inequality. *Lindsly v. National Carbonic Gas Co.*, 220 U.S. 61, 78.

A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. *McGowan v. Maryland*, 366 U.S. 420, 426. Justification of Conn. Gen. Stat. Section 46b-168 may be made without

much difficulty. Conn. Gen. Stat. Section 46b-168 provides that the costs of taking blood grouping tests shall be chargeable against the party making the motion. The purpose of this provision is clear. Since the Court may order the taking of blood grouping tests the specific requirement regarding their payment was to insure that the judiciary, and in turn the State, would not be held liable for the costs of such tests when performed pursuant to a court order. The legislation is designed to insure that litigants bear the costs entailed in the preparation of their cause of action, or their defense. The statute is therefore supported by a clear rational basis.

The fact that an indigent defendant in a paternity action may not obtain a blood grouping test is nothing more than a form of economic inequality which is often encountered by most people in their daily lives. The legislature of Connecticut is aware of such inequities and it is there where the petitioner's problem should be considered. To have this Court settle the petitioner's problem is to mute the legislative process without attempting to achieve a more practical solution for all concerned.

CONCLUSION

Conn. Gen. Stat. Section 46b-168 (1979) does not violate the Due Process nor the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The judgment of the Appellate Session of the Superior Court of Connecticut should, therefore, be affirmed.

Respectfully submitted,

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Supreme Court, U. S.
FILED
NOV 24 1980
MICHAEL RODAK, JR., CLERK

No. 79-6779

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WALTER LITTLE,

Appellant,

v.

GLORIA STREATER,

Appellee.

ON APPEAL FROM THE APPELLATE SESSION OF THE SUPERIOR COURT OF CONNECTICUT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE CONNECTICUT CIVIL LIBERTIES UNION *AMICI CURIAE*

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TABLE OF CONTENTS

	Pages
TABLE OF AUTHORITIES.....	iii
INTEREST OF AMICI.....	1
SUMMARY OF ARGUMENT.....	3
ARGUMENT.....	8
I. THE HEARING BELOW, IN FORM A CIVIL SUIT BETWEEN PRIVATE PARTIES, WAS IN SUBSTANCE THE MEANS BY WHICH CONNECTICUT SOUGHT TO DEPRIVE APPELLANT OF PROPERTY.....	8
II. BECAUSE THE HEARING BELOW WAS ALSO AN ATTEMPT BY CONNECTICUT TO IMPOSE ON APPELLANT A FUNDAMENTAL RELATIONSHIP WHICH WOULD DEPRIVE HIM OF PROTECTED LIBERTY, CONNECTICUT WAS REQUIRED BY THE DUE PROCESS CLAUSE TO TAKE REASONABLE STEPS TO DETERMINE WHETHER OR NOT THAT RELATIONSHIP EXISTS.....	14

Pages

III. ACCORDING TO THE TEST OF MATHEWS V. ELDRIDGE, DUE PROCESS REQUIRES THAT THE REASONABLE COSTS OF BLOOD-TYPE TESTING BE BORNE BY THE STATE WHERE SUCH TESTING WOULD OTHERWISE NOT BE CONDUCTED BECAUSE OF THE INDIGENCY OF THE PUTATIVE FATHER.....22

A. Both The Property And Liberty Interests Of The Putative Father Are Substantial..23

B. Paternity Actions Present Substantial Risks Of Erroneous Deprivations Of Liberty And Property. Blood-Type Testing Would Substantially Reduce Those Risks.....28

C. Blood-Type Testing Would Further Important State Interests, At A Nominal Cost, And With No Additional Administrative Burdens..36

CONCLUSION.....47

TABLE OF AUTHORITIES

Cases	Pages
Armstrong v. Manzo, 380 U.S. 545 (1965)	15
Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1935)	43
Board of Curators, University of Missouri v. Horowitz, 435 U.S. 78 (1978)	18
Boddie v. Connecticut, 401 U.S. 371 (1971)	passim
Doe v. Harder, 310 F.Supp. 302 (D. Conn. 1970)	12
Doe v. Shapiro, 302 F.Supp. 761 (D. Conn. 1969)	12
Ferro v. Morgan, 35 Conn. Supp. 689, cert. denied 177 Conn. 753, 399 A.2d 526 (1979)	41
Goldberg v. Kelly, 397 U.S. 254 (1970)	15
Griffin v. Illinois, 351 U.S. 12 (1956)	2
Holmes v. McLean, 5 Conn. Cir. 476, 256 A.2d 849 (1969)	29,35
Kelsaw v. Green, 6 Conn. Cir. 516, 276 A.2d 909 (1971)	29

Cases	Pages
Mathews v. Eldridge, 424 U.S. 319 (1976).....	passim
Moore v. East Cleveland, 431 U.S. 494 (1977).....	27
Morrissey v. Brewer, 408 U.S. 471 (1972).....	15,16,22
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)....	15
Ortwein v. Schwab, 410 U.S. 656 (1973).....	19
Parham v. J. R., 442 U.S. 584 (1979).....	16,18
Robertson v. Apuzzo, 170 Conn. 367 (1975), 365 A.2d 824, cert. denied, 429 U.S. 852.....	8
Roe v. Wade, 410 U.S. 113 (1973).....	27
Stanley v. Illinois, 405 U.S. 645 (1972).....	27
Terrasi v. Andrews, 3 Conn. Cir. Ct. 499, 217 A.2d 75 (1966), cert. denied, 153 Conn. 729, 214 A.2d 130, reconsideration denied, 153 Conn. 731, 214 A.2d 683.....	9

Cases	Pages
United States v. Kras, 409 U.S. 434 (1973)	19,28
Williams v. Gray, 4 Conn. Cir. 326, 231 A.2d 285 (1967)	35
Wood v. Georgia, 370 U.S. 375 (1962)	17
Zablocki v. Redhail, 434 U.S. 374 (1978)	27

Statutes and Regulations

Calif. Evid. Code, §895	33
45 C.F.R., §303.5(c)	46
45 C.F.R., §304.20(b)(2)(i)(B)	45
Conn. Gen. Stat. §46b-160	10,35
Conn. Gen. Stat. §46b-162	10
Conn. Gen. Stat. §46b-165	10
Conn. Gen. Stat. §46b-168	21
Conn. Gen. Stat. §46b-169(b)	9
Conn. Gen. Stat. §46b-170	10
Conn. Gen. Stat. §46b-171	passim
Conn. Gen. Stat. §46b-176	26

Statutes and Regulations — Pages

Regulations of Connecticut State Agencies, §17-82e-4..... 40

Regulations of Connecticut State Agencies, §17-82e-6..... 10

11 U.S.C. §523(a)(5)..... 25

42 U.S.C. §§651-662..... 25,42

42 U.S.C. §654(4)(A)..... 43

42 U.S.C. §654(6)..... 43

Other Authorities

Reid, "Utilizing The Lie Detector Technique To Determine The Truth In Disputed Paternity Cases," 45 J. Crim. L.C. & P.S. 213 (1954)..... 30

Ellman and Kaye, "Probabilities and Proof: Can HLA and Blood Group Testing Prove Paternity?" 54 N.Y.U.L.Rev. 1131 (1979)..... 34

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H.E.W. Office of Child Support Enforcement, Blood Testing to Establish Paternity (1977)..... 36,37

Other Authorities — Pages

Henningsen, "Some Aspects of Blood Grouping in Cases of Disputed Paternity in Denmark," 2 Methods of Forensic Science 209 (1963)..... 34

"Joint AMA-ABA Guidelines: Present Status of Serologic Testing in Problems of Disputed Parentage," 10 Family Law Quarterly 247 (1976)..... 33

Krause, Illegitimacy: Law and Social Policy (1971)..... passim

Poulin, "Illegitimacy and Family Privacy", 70 Northwestern U.L.Rev. 910 (1976)..... 31

Sussman, Paternity Testing by Blood Grouping (2d ed. 1976)..... 34

Sussman & Schatkin, "Blood Grouping Tests in Undisputed Paternity Proceedings," 164 J.A.M.A. 249 (1957).... 30

Teraski, "Resolution by HLA Testing of 1,000 Paternity Cases Not Excluded by ABO Testing," 16 J.Fam.L. 543 (1978)..... 34

Tribe, American Constitutional Law (1978) 28

1974 U.S. Code Cong. and Adm. News 8133 44

INTEREST OF AMICI */

The American Civil Liberties Union is a nationwide, non-partisan organization of over 200,000 members dedicated to protecting the fundamental rights of the people of the United States. Central among those rights is the right of due process of law, the embodiment of our constitutional commitment to justice through procedural fairness. Accordingly, the ACLU has participated in numerous cases to ensure that individuals threatened with adverse action by the government be offered the basic requirement of due process, a meaningful opportunity to be heard.

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*/ Letters of consent from both parties to the filing of this brief have been lodged with the Clerk of the Court.

In this case, as in a very few others the Court has decided in the past, it is necessary to explore the circumstances under which government must ensure due process by providing not merely an opportunity, but the means for being heard. Amici's experience in representing a variety of indigent litigants has led to our conclusion that in light of the fundamental and protected interests of the appellant at stake, the conceded relevance and probative value of the procedure sought, and the interests of the state, appellant's right to provision of the blood-type test sought is analogous to the rights of litigants recognized in such cases as Boddie v. Connecticut, 401 U.S. 371 (1971) and Griffin v. Illinois, 351 U.S. 12 (1956). Moreover, the interest of the child in-

volved -- the unrepresented, but central party to the dispute -- further buttresses appellant's claim to the procedure sought.

This case raises an extremely narrow, but extremely important question, and we submit this brief amici curiae to assist the Court in its resolution.

SUMMARY OF ARGUMENT

The question posed by this appeal is extremely narrow: where a state causes a paternity hearing to be instituted in order to gain money from the putative father, does the constitutional guarantee of due process require that the cost of concededly relevant and probably dispositive blood-type testing be borne by the state where such testing could not otherwise be conducted because of the indigency of the putative father? As

phrased here, the Court's decision would be applicable to only a small category of paternity hearings. These, like the case below, must (1) focus on a child who is both illegitimate and a recipient of public assistance, (2) be initiated by the state in order for it to gain money from the putative father, and (3) be directed against a man who is himself indigent. The procedure required in all other paternity hearings -- and all other hearings of any sort -- would remain unaffected.

Actually, the question is even narrower. This case arises in Connecticut which, by law, provides that the requested test is relevant and its results are admissible in paternity proceedings. Connecticut law also provides that the testimony of a credible putative father is not of itself sufficient to rebut the testimony of a credible mother.

Thus, in Connecticut indigent putative fathers are required by law to introduce some evidence other than their own disclaimers of paternity, but they are prevented by their indigency from introducing in evidence test results which Connecticut law deems probative, and which would confirm non-paternity with 100% accuracy in more than 90% of all cases. The testing costs are nominal, as low as $200 to $300. And since the federal government, which strongly encourages utilization of such tests, would provide 75% reimbursement, the actual cost to Connecticut would be only $50 to $75.

The question, then, is whether a state can initiate a paternity proceeding, can require the putative father to introduce evidence other than his own testimony, and can then refuse to absorb the nominal

cost of a blood-type test the state concedes is relevant, highly probative, and probably dispositive, when the putative father is indigent.

Providing blood-type testing in those circumstances would further important interests of all parties. For the innocent putative father, the test serves as his only effective defense against the state's attempt to deprive him of property and force on him a fundamental family relationship where none exists. Without the test, the putative father's opportunity to defend would be practically meaningless. For the state, such a test will frequently result in a net savings, since the costs of obtaining and enforcing a judgment will probably be greater than the payments any indigent defendant will be able to afford. (Appellant pays $2.00 per month).

For the child, the test would help assure a reliable finding of paternity, perhaps eliminating as a potential father a man whose only distinction is his indigency. And the state has an acknowledged interest and responsibility to the child to make all reasonable attempts to ensure accuracy in the determination of paternity.

The determination of paternity or non-paternity affects fundamental interests. In these circumstances, due process requires the state to adopt reasonable procedures for resolving disputed factual contentions. Under the three-part test enunciated in Mathews v. Eldridge, 424 U.S. 319 (1975), the blood-type test requested by Appellant is a reasonable procedure which Connecticut, in the circumstances of this case, is constitutionally required to provide.

ARGUMENT

I. THE HEARING BELOW, IN FORM A CIVIL SUIT BETWEEN PRIVATE PARTIES, WAS IN SUBSTANCE THE MEANS BY WHICH CONNECTICUT SOUGHT TO DEPRIVE APPELLANT OF PROPERTY.

It is indisputable that a state may not deprive an individual of property without due process. The proceeding below, in form a suit between private parties, was in reality a suit brought by the state, thus subjecting the procedures to the requirements of due process.

Under Connecticut law, determination of the paternity of an illegitimate child takes the form of a civil action. Robertson v. Apuzzo, 170 Conn. 367 (1975), 365 A.2d 824, cert. denied, 429 U.S. 852. The child's mother typically assumes the role of plaintiff, alleging some male to be its biological father. A determination of paternity is made at trial if she presents a "fair pre-

ponderance of the evidence." Terrasi v. Andrews, 3 Conn. Cir. Ct. 499, 217 A.2d 75 (1966), cert. denied, 153 Conn. 729, 214 A.2d 130, reconsideration denied, 153 Conn. 731, 214 A.2d 683.

If the illegitimate child is a recipient of public assistance, the paternity hearing remains, in form, a private civil action. However, although the suit is still officially filed in the mother's name, the State of Connecticut is the real plaintiff. The mother is powerless: she is required by state law to "disclose the name of the putative father" to the state and to "institute an action to establish the paternity of said child." Conn. Gen. Stat. §46-169(b).

After the suit is filed, the mother's cooperation is of no consequence. If she neglects or refuses to name an attorney,

the state chooses one from among its list of those willing to serve "within department requirements". Regulations of Connecticut State Agencies §17-82e-6. If she is unwilling to testify, she may be subpoenaed, Conn. Gen. Stat. §46b-162, and will not be excused from testifying, Conn. Gen. Stat. §46b-165. The state assures the protection of its interests in other ways as well. Its Attorney General is automatically made a party to the action, Conn. Gen. Stat. §46b-160, and no withdrawal or settlement can be made without his approval. Conn. Gen. Stat. §46b-170.

A finding of paternity results in recovery from the adjudged father of all expenses incurred by the state. The "lying-in" costs of mother and child and the accrued maintenance of the child are all charged to the father. Conn. Gen. Stat.

§46b-171. "[R]easonable attorney fees" -- the costs of the state-approved private attorney who represented the mother -- are also charged to him. Id. Finally, if it appears that the child will remain a recipient of public assistance, future child support will be payable by the father directly to the state. Id.

The paternity hearing below followed precisely this procedure. Gloria Streater, the mother of a child receiving public assistance, was compelled to give the state the name of a man as its putative father. 1/ A private attorney was appointed and the Attorney General filed an

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1/ See Plaintiff's Disclosure and Production, ¶59, July 20, 1980. The disclosure was made on threat of discontinuation of appellee's eligibility for public assist-

(footnote cont'd on next page)

appearance for the state. Appellant was found at trial to be the child's biological father, and was judged liable for lying-in costs, accrued maintenance, attorney fees, and future child support. Judgment and Order, October 16, 1978. None of these sums was payable to the mother or her child. Instead, appellant was ordered to send all installments of the entire judgment to the Department of Finance and Control, State of Connecticut. Id. The

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(footnote cont'd from previous page)
ance. See Appellant's "Facts Proven," ¶4, November 17, 1978, and Appellee's concurring "Counterfinding," ¶1, December 13, 1978. Oddly, neither party has noted that the use of this threat has been specifically enjoined for years. Doe v. Shapiro, 302 F.Supp. 761 (D.Conn. 1969); Doe v. Harder, 310 F.Supp. 302 (D.Conn. 1970).

state's interest and role in this nominally "private" litigation is perhaps best gauged by the assignment of an Assistant Attorney General to represent the mother here and at all other appellate proceedings in this case.

The goal and effect of the proceeding below is evident. To gain money, Connecticut compelled the mother of an illegitimate child to name a man as its biological father, forced her to serve as a nominal plaintiff in a suit against him, and then paid for and directed prosecution of that suit. Upon the determination that the man so named was the biological father, the state was awarded appellant's property.

Such enrichment is, of course, well within the power of the state. However, in order for any state to deprive a per-

son of property, it is required by the Fourteenth Amendment to exercise "due process of law".

II. BECAUSE THE HEARING BELOW WAS ALSO AN ATTEMPT BY CONNECTICUT TO IMPOSE ON APPELLANT A FUNDAMENTAL RELATIONSHIP WHICH WOULD DEPRIVE HIM OF PROTECTED LIBERTY, CONNECTICUT WAS REQUIRED BY THE DUE PROCESS CLAUSE TO TAKE REASONABLE STEPS TO DETERMINE WHETHER OR NOT THAT RELATIONSHIP EXISTS.

Even if the state had not sought a money judgment, it did seek to impose on Appellant a fundamental relationship whose existence he denied. Imposition of that relationship would deprive Appellant of constitutionally recognized liberty interests.

When the state threatens to deprive a person of a liberty interest, due process requires that he be afforded a

"hearing appropriate to the nature of the case." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). This hearing must be conducted "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

These guidelines, first established in cases where the state was merely adjudicating the conflicting claims of private persons, apply a fortiorari where the state itself is seeking to deprive a person of protected interests. The Court's attention has recently been focused on the formality required of such proceedings. In certain circumstances, the opportunity to cross-examine witnesses and offer evidence was found necessary, see Goldberg v. Kelly, 397 U.S. 254 (1970)(basic welfare revocation), Morrissey v. Brewer,

408 U.S. 471 (1972)(parole revocation), while in others it was not, see Mathews v. Eldridge, 424 U.S. 319 (1976)(revocation of Social Security disability benefits). Where the government official most involved might have too great an interest to decide a matter impartially, the government has been required to provide an independent person or tribunal to make the final determination. Morrissey v. Brewer, supra at 471. By contrast, where the official most involved may be considered impartial, and has relevant expertise, his determination alone may be adequate. Parham v. J. R., 442 U.S. 584 (1979)(admission to state mental hospital).

Common to all these cases has been the fact-finding role of the state. Due process does not permit the state, as it

would a private litigant, to deprive private persons of constitutionally protected interests without concern for fairness to the party it is acting against. Rather, it imposes on the state a duty, varying in strength depending on the nature of the case, to conduct an impartial study of facts relevant to the person's protected interest, and to act only in accordance with those facts. Cf. Wood v. Georgia, 370 U.S. 375, 390 (1962)(grand jury). Even where the Court has found a formal hearing unnecessary prior to a definitive deprivation of liberty or property, it has done so only because of its judgment that due process was satisfied by the extensive fact-finding procedures undertaken -- and paid for -- by the state. See, e.g., Mathews v. Eldridge,

supra, at 335-339; Parham v. J. R., supra, at 613-617; Board of Curators, University of Missouri v. Horowitz, 435 U.S. 78, 80-82 (1978).

Connecticut has given putative fathers the protection of a formal judicial hearing. However, such protection at the point of deprivation does not always exhaust the requirements of due process. Here, where the state has assumed the unique role of raising and then deciding whether a fundamental family relationship exists, it assumes a significant responsibility for ensuring that it acts on the basis of reliable facts. This responsibility is not discharged by the single act of forcing the mother to name some man as her child's putative father. The state owes more to both the child and the putative father. Specifically, as we

demonstrate below, it must ensure that a simple, reasonably-priced, concededly relevant and frequently dispositive test be conducted.

The state's responsibility as fact-finder is paralleled by its obligation to Appellant to assure him a meaningful hearing. In this regard, the present case closely resembles Boddie v. Connecticut, 401 U.S. 371 (1971). In Boddie, the state had monopolized the means whereby private persons could voluntarily form or dissolve a marital relationship. Their interest in such a relationship was called "fundamental". Cf. United States v. Kras, 409 U.S. 434 (1973)(bankruptcy), Ortwein v. Schwab, 410 U.S. 656 (1973)(welfare). In the present case, the state has monopolized the means whereby a relationship as basic as marriage can be created

involuntarily and irrevocably. The state declares two individuals to be related by blood: to be parent and child. But the state does not merely preside over this creation of a fundamental family relationship, it actually institutes the proceeding. Appellant here is thus like the plaintiff in Boddie: he is forced by the state to rely on state court proceedings to protect his basic interests.[2/] Obviously, his opportunity to be heard must be meaningful in fact, as well as in theory.

[2/] To defend those interests Connecticut requires a putative father not only to appear in court, but also to produce evidence beyond his own testimony, even though as a practical matter, given the private nature of most sexual relationships, such evidence (other than blood-type testing) will rarely exist. See infra n.8.

Amici do not contend that the Constitution requires the state to pay for blood-typing tests in all cases of disputed paternity. In most, it is enough that the rules of evidence at the ultimate hearing allow the admission of such tests, as Connecticut's rules do. See Conn. Gen. Stat. §46b-168. However, where the putative father cannot utilize such tests because of his indigency, the state's constitutional responsibility as fact-finder and as guarantor of a meaningful hearing may require positive action on its part. To determine whether due process requires the provision of blood-type testing under these exceptional circumstances, we consider those factors that determine the requirements of due process in any context.

III. ACCORDING TO THE TEST OF MATHEWS V. ELDRIDGE, DUE PROCESS REQUIRES THAT THE REASONABLE COSTS OF BLOOD-TYPE TESTING BE BORNE BY THE STATE WHERE SUCH TESTING WOULD OTHERWISE NOT BE CONDUCTED BECAUSE OF THE INDIGENCY OF THE PUTATIVE FATHER.

Due process, this Court has long held, "is flexible and calls for such procedural protections as the particular situation demands", Morrissey v. Brewer, supra at 481.

Whether a particular procedural safeguard is constitutionally required is determined by applying the three-part test enunciated in Mathews v. Eldridge, supra at 335:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute pro-

cedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

In the present case, state payment for blood-type testing is necessitated by this test under each of the three factors.[3/]

A. Both The Property And Liberty Interests Of The Putative Father Are Substantial.

The determination of biological fatherhood of an illegitimate child receiving

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[3/] Mathews was decided after Boddie v. Connecticut and its progeny. Accordingly, the Court has not expressly applied the Mathews three-part test in earlier cases deciding whether the state must provide particular litigants the means, as well as the opportunity, for particular procedures required by due process. However, the analysis in, and holdings of, those cases fit comfortably within the Mathews test.

public assistance results in the financial obligations specified in Conn. Gen. Stat. §46b-171 and reviewed in Point I, supra. The actual dollar sums flowing from those obligations are quite substantial.

Appellant was found liable for a judgment made up of "lying-in expenses" ($852.02), "accrued maintenance" extending from the day of the child's birth to the judgment ($5,790.26), and the "costs of suit plus reasonable attorney's fees" ($332.20). These sums total $6,974.48. In addition, Appellant was ordered to make payments to cover "child support" at the rate of $163.58 a month. Computed to cover the remaining fifteen and a half years of the child's minority, these payments come to $30,425.88. Appellant was thus ordered to pay a judgment of over

$37,000.00 -- all payable to the State of Connecticut. Judgment and Order, October 16, 1978.

Little of this substantial judgment was ordered payable immediately. Apparently because of Appellant's indigency, the court directed the payment of only $2.00 per month. Although this sum is minimal, the judgment itself remains payable throughout Appellant's life. It cannot be discharged in bankruptcy, 11 U.S.C. §523(a)(5), and cannot be escaped by moving to a different state, 42 U.S.C. §§651-662. If Appellant should cease to be indigent, the court can order an increase in his payments to the state. See Conn. Gen. Stat. §46b-171. Failure to meet any of the ordered payments may result in imprisonment for contempt of court. Id.

A period of up to six months of hard labor could then be served, although still without any discharge from his liability. Conn. Gen. Stat. §46b-176.

At the time of the hearing, the only practical method of demonstrating Appellant's non-paternity, i.e., the blood-type test (see Section IIIB, infra), was beyond his means. Later, when he may have the income to pay for such tests, it will be too late to do so. Res judicata has fixed his legal paternity for all time, so his new-found income can only be devoted to the discharge of the state's $37,000.00 judgment against him.

More drastic than even this deprivation of property, or the deprivation of physical liberty with which Connecticut threatens him for failure to satisfy the judgment, is the deprivation of

fundamental liberty that the judgment effects. Appellant has a constitutionally protected and fundamental interest in choosing whether to associate with others in a family. [4/] In cases as diverse as Roe v. Wade, 410 U.S. 113 (1973), Stanley v. Illinois, 405 U.S. 645 (1972), Moore v. East Cleveland, 431 U.S. 494 (1977), Zablocki v. Redhail, 434 U.S. 374 (1978), and Boddie v. Connecticut, supra, the Court has protected the right of adults to engage in, or separate themselves from, familial relationships sanctioned by state power.

[4/] Amici do not, of course, dispute that the state may impose obligations on real fathers of illegitimate children.

Connecticut has acted through its courts to impose on Appellant a familial relationship, and consequent familial obligations, which he does not choose to assume and for which he claims not to be responsible. Under this Court's cases, assuming the facts are as he alleges, he has a fundamental right not to have a father-relationship imposed on him. 5/

B. Paternity Actions Present Substantial Risks Of Erroneous Deprivations Of Liberty And Property. Blood-type Testing Would Substantially Reduce Those Risks.

Paternity hearings are plagued with "coercion, corruption, perjury and indiffer-

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5/ In United States v. Kras, 409 U.S. 434 (1973), this Court read Boddie v. Connecticut, supra, to apply only where a civil litigant's fundamental interest was at stake and where the state had monopolized resolution of disputes concerning that interest. This case plainly satisfies both those criteria. See generally, Tribe, American Constitutional Law, at 1111, 1118-1122.

ence to the rights of the individual defendant." Family Study Commission, State of Illinois, Report and Recommendations 55 (1969), as quoted in H. Krause, Illegitimacy: Law and Social Policy, 107 (1971). This sad situation results from the insufficiency of court time allotted such case, see id., and the common assumption that, where the mother's and putative father's testimony conflict, the former is in the right. See id., Kelsaw v. Green, 6 Conn. Cir. 516, 276 A.2d 909 (1971); Holmes v. McLean, 5 Conn. Cir. 476, 256 A.2d 849 (1969). Also responsible is the peculiarity of the issue being adjudicated: conception is a biological event about which ordinarily only two persons might have probative evidence. Disinterested witnesses are a rarity.

The extent of perjury and simple

ignorance manifested under these circumstances is understandable, if shocking. One study found that fully "93% of the tested parties lied in some respect...as to their sexual relationship." Arthur & Reid, "Utilizing The Lie Detector Technique To Determine The Truth In Disputed Paternity Cases," 45 J. Crim. L.C. & P.S. 213, 215 (1954), as quoted in Krause, Illegitimacy, supra at 107. Results from another study demonstrate that paternity findings are grossly inaccurate even when based on admissions of both sexual intercourse and paternity: 18% of those men who voluntarily admitted paternity were not, in fact, the fathers of the children in question. Sussman & Schatkin, "Blood Grouping Tests in Undisputed Paternity Proceedings," 164 J.A.M.A. 249-50 (1957),

as cited in Krause, Illegitimacy, supra at 108.

The problem of unreliability is especially serious when the state causes the paternity hearing to be undertaken. Forced to name a putative father, the mother may wish to protect the actual father or protect herself from retribution from him. See Poulin, "Illegitimacy and Family Privacy," 70 Northwestern U. L. Rev. 910, 923-924 (1976). Alternatively, where she simply does not know which of two or more men is the biological father, she is nevertheless constrained to name one and testify against him. See Point I, supra.

Finally, the standard of proof used in paternity hearings further aggravates the problem. Previously, when paternity was considered a criminal offense (as it was in Connecticut), it had to be demon-

strated beyond a reasonable doubt. See Krause, Illegitimacy, supra at 109. Now, usually reclassified as a civil action, the measure of proof is generally that of a "preponderance of the evidence." Id.; see supra, at 8-9.[6/] Faced with "an accusation by the woman and a denial by the defendant..., the judges feel constrained to enter a finding of paternity." Family Study Commission, supra.

In stark contrast to the unreliability of human testimony concerning paternity stands the well-developed technology of blood-type testing. Such laboratory procedures compare various genetic qualities

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[6/] Whether that low standard satisfies the requirements of due process is not at issue in this case.

of the blood of the child with that of its mother and putative father. Where the child's carries a characteristic that neither of the others' has, the putative father is absolutely excluded as the true father. See generally, Krause, Illegitimacy, supra at 123-136; works cited infra at n.7. So reliable is this method that some states require that where non-paternity is so indicated the issue of paternity must be resolved accordingly. See, e.g., Calif. Evid. Code, §895.

In 1976, a joint AMA-ABA committee issued a report recognizing the precision achieved by blood-type testing. Joint AMA-ABA Guidelines: Present Status of Serologic Testing in Problems of Disputed Parentage, 10 Family Law Quarterly 247 (1976). The report also set forth a battery of seven

tests recommended "for routine use". Id. at 254. Statistically, more than nine out of ten men -- 91 to 93% -- would be definitely excluded through its application. Id. at 257. 7/

Blood-type testing thus introduces the element of scientific precision into an adjudicatory context in which inaccuracy is common. Instead of perjury or the unreliable testimony of interested parties, it offers disinterested evidence. And

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7/ Further literature attesting to the accuracy of blood-type testing includes: Terasaki, "Resolution by HLA Testing of 1,0^0 Paternity Cases Not Excluded By ABO Testing," 16 J.Fam.L. 543 (1978); L. Sussman, Paternity Testing by Blood Grouping (2d ed. 1976); and Ellman and Kaye, "Probabilities and Proof: Can HLA and Blood Group Testing Prove Paternity?" 54 N.Y.U.L.Rev. 1131 (1979). A report of results surpassing 99% exclusion appears in Henningsen, "Some Aspects of Blood Grouping in Cases of Disputed Paternity in Denmark," 2 Methods of Forensic Science 209, 224-25 (1963).

such evidence corrects an evidentiary imbalance. Where, as in Connecticut, the state's burden of proof is satisfied by nothing more than the mother's allegation and testimony, even if disputed by the putative father, the father is in need of some evidence beyond his denial to rebut her claim. [8/] This -- if he is indeed innocent of the charges -- can be supplied by blood-type tests with 100% accuracy in more than 90% of the cases.

[8/] Connecticut provides, as a matter of law, that the testimony of a putative father is not, of itself, sufficient to rebut the mother's accusations. See Holmes v. McLean, 5 Conn. Cir. 476, 256 A.2d 849 (1969); Williams v. Gray, 4 Conn. Cir. 326, 231 A.2d 285 (1967). Testimony concerning earlier accusations is admissible to prove the truth of those accusations under a statutory exception to the usual hearsay rules. See Conn. Gen. Stat. §46b-160.

C. Blood-Type Testing Would Further Important State Interests, At A Nominal Cost, And With No Additional Administrative Burdens.

State-paid blood-type tests where the putative father is indigent will often save the state money, and will facilitate accuracy in determining the parentage of the child, its ward.

Connecticut presumably resists payment for blood-type testing for indigent putative fathers because of the cost involved. Hospitals surveyed in an H.E.W.-sponsored study charge between $200 and $300 for procedures evaluating the seven genetic traits recommended by the AMA-ABA Guidelines. [9/] See H.E.W. Office of Child

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[9/] As we demonstrate infra, the federal government would pay 75% of the cost of all blood-type tests. The cost to Connecticut would thus be about $50 to $75.

Support Enforcement, Blood Testing to Establish Paternity (1977), Table XI. However, to consider only these immediate expenses would be short-sighted. The state incurs other expenses when it does not pay for these tests, and these can be substantial. For example, failure to provide such tests necessarily results in a greater percentage of defendants being adjudged to be biological fathers. (At least some of those for whom the tests would exclude paternity would be incorrectly found to be the children's fathers.) A greater number of adjudged fathers would result in a greater number of monetary judgments, and thus, apparently, more income for the state. However, unlike non-indigant putative fathers of AFDC children generally -- as to whom Congress has found that the reimburse-

ments received outweigh the administrative costs of recoupment -- all of these adjudged fathers are indigent. Accordingly, although judgment against them might be considerable, actual recovery will be negligible. Appellant, for example, pays Connecticut only $2 per month of his $37,000 judgment.

A few of these indigent adjudged fathers might someday earn enough money to generate income for the state. However, the likelihood that the state would discover such new-found wealth, then gain a new court order increasing payments under the judgment, and then actually receive these monies is doubtful. By contrast, the effort to obtain and enforce paternity judgments always entails substantial administrative and judicial costs.

The state must monitor the income of all indigent adjudged fathers, seek new court orders, and attempt to collect the greater payments.

By supplying blood-type tests to indigent putative fathers, the state would discover that some of them are not, in fact, the fathers of the children in question. This discovery would result in several financial benefits. Dismissal of the paternity action would save the state the further costs incurred by the private attorney prosecuting the case and by the assistant attorney general representing the state's interests. State court time would likewise be reduced. The discovery of non-paternity would eliminate the expenses incurred in the collection of such nominal sums as $2 a month.

Finally, the discovery of non-paternity might even enable the state to elicit from the mother the name of the true father, who might not be indigent.

The state also has a non-financial interest and "responsibility" to "make all reasonable attempts" to determine paternity. Connecticut's own regulations acknowledge the value Connecticut places on assisting illegitimate children to determine their true parentage:

> It is the responsibility and obligation of the State on behalf of the concerned child to make all reasonable attempts to determine the identity of the child's father in all cases where paternity has not been legally established and to provide financial assistance for the establishment of paternity for both AFDC and non-AFDC cases in accordance with the established procedures.
>
> Sec. 17-82e-4.

It is hard to square the actual practice of Connecticut with this avowal of "responsibility and obligation...on behalf of the concerned child." Certainly its sole effort, the coercion of the mother to name some man as father, does not constitute "all reasonable attempts to determine the identification of the child's father." 10/ Plainly, it would be "reasonable" to "attempt" to determine paternity through use of blood-type

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10/ Appellant apparently did not argue that this regulation, which would seem to embody an obligation "for the establishment of paternity", not merely for the institution of paternity proceedings, required the state to pay for the blood test as a matter of state law. Nor did the Connecticut courts raise the point sua sponte. In light of Ferro v. Morgan, 35 Conn.Supp. 689, cert. denied 177 Conn. 753, 399 A.2d 526 (1979), any such effort would likely have been fruitless.

tests. 11/ As to the short-run costs involved in such testing, the regulations are clear: the state has an "obligation" to "provide financial assistance" in its attempt to determine paternity.

Connecticut's behavior is even less comprehensible in light of the federal statute under which the state receives 75% of its child support monies. 42 U.S.C. §§651-662.

11/ The reasonableness of state-supported blood-type testing for indigent defendants in paternity actions is demonstrated by the number of states that expressly allow (or allow by more general rule) blood-type testing costs to be charged to the state. See Jurisdictional Statement at 7-9 & n.7. Apparently, North Carolina is the only state beside Connecticut obligating the requesting party to pay for blood-type testing in advance.

The participating state must "undertake...to establish the paternity" of an illegitimate child receiving public assistance. 42 U.S.C. §654(4)(A). 12/ Even those illegitimate children who are ineligible for government aid enjoy access to the state's "paternity determination services." 42 U.S.C. §654(6).

The legislative history accompanying this federal statute makes clear the

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12/ So far as amici are aware, Appellant has not argued that the federal statute of its own force requires the state to provide blood-type testing to indigent paternity defendants. Because the plain language of the statute permits -- if not compels -- such a construction, this Court could rest its decision on this statutory ground. Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1935) (Brandeis, J., concurring).

policy behind requiring such services:

> In taking the position that a child born out of wedlock has a right to have its paternity ascertained in a fair and efficient manner, the [Senate Finance C]ommittee acknowledges that legislation must recognize the interest primarily at stake in the paternity action to be that of the child. Since the child cannot act on his own behalf in the short time after his birth when there is hope of finding its father, the Committee feels a mechanism should be provided to ascertain the child's paternity whenever it seems that this would both be possible and in the child's best interest.
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> 1974 U.S. Code Cong. and Adm. News 8133, 8155.

The report goes on to note that "paternity can be ascertained with reasonable assurance, particularly through the use of scientifically conducted blood typing." Id.

Although the regulations issued under the statute do not explicitly require blood-type testing, they do encourage the practice through a provision that explicitly affords blood-type testing requested by state officials the usual 75% federal contribution to state child support programs. 45 C.F.R. §304.20(b)(2)(i)(B). Connecticut's inexplicable refusal to make use of this federally sanctioned method of establishing paternity constitutes a curious denial of its interests, both as acknowledged by its regulations and as specified by national child-support policy.

Finally, Connecticut has not claimed that state provision of blood-type testing would entail significant administrative burdens. Nor could it in light of the statutory recognition of the value of

such testing, its common use by non-indigent defendants, and the existence of a state-prepared list of approved laboratories.[13/] Indeed, blood-type testing for indigent defendants would dispositively eliminate many named innocent putative fathers against whom the state would be otherwise required to institute proceedings under its federally-approved plan, thereby substantially reducing the state's administrative burden.

13/ All states that participate in the federal child support program must compile a list of laboratories conducting "legally and medically acceptable" blood-type tests. This list must be made available to state authorities, the courts, and to private persons. 45 C.F.R. §303.5(c).

CONCLUSION

Amici submit that application of the *Mathews v. Eldridge* test mandates state provision of blood-type tests to indigent defendants in state-instituted paternity proceedings. Accordingly, for the foregoing reasons, the judgment of the Appellate Session of the Superior Court should be reversed, and the case remanded for further proceedings consistent with the opinion of the Court.

Respectfully submitted,

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November 20, 1980

*Counsel gratefully acknowledge the substantial assistance of Lawrence M. Martin, a third-year student at Yale Law School, in the research and preparation of this brief.